

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

United States Court of Appeals FOR THE DISTRICT OF COLUMBIA

No. 9305

478

MORTON FRIEDMAN,

Appellant,

v.

LEWIS B. SCHWELLENBACH, et al.,

Appellees.

Appeal from Order of the District Court for the
District of Columbia

*United States Court of Appeals
for the District of Columbia*

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 9305

MORTON FRIEDMAN,

Appellant,

v.

LEWIS B. SCHWELLENBACH, individually and as Secretary of Labor, HARRY B. MITCHELL, LUCILLE FOSTER McMILLIN and ARTHUR S. FLEMMING, individually and as members of the Civil Service Commission,

Appellees.

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JURISDICTIONAL STATEMENT

Jurisdiction to try the case was vested in the District Court for the District of Columbia, by virtue of the fact that the case arose under the Constitution and the Laws of the United States, to wit, the First and Fifth Amendments to the Constitution of the United States, the Act of January 16, 1883, 22 Stat. 403, 5 U. S. C. 1940 Ed., Section 632 et seq. (hereinafter referred to as the Civil Service Act), the Act of August 24, 1912, 37 Stat. 555, 5 U. S. C. 1940 Ed., Section 652, the Act of August 2, 1939, 53 Stat. 1147, 18 U. S. C. 1940 Ed., Section 61, as amended (hereinafter referred to as the Hatch Act), Executive Order No. 8587, Nov. 7, 1940, Section 11-306 of the District of Columbia Code and 28 U. S. C. 400 (App. 1).

On April 18, 1946, the District Court granted a motion for summary judgment by the defendants and denied a motion for summary judgment by the plaintiff. Notice of appeal was filed April 24, 1946 (App. 72).

Jurisdiction to review the judgment of the District Court is vested in this Court by virtue of Title 17, Section 17-101 of the District of Columbia Code, 1940.

STATEMENT OF THE CASE

The action below was for a declaratory judgment that plaintiff was unlawfully dismissed from Government employment, for an order directing his reinstatement, for an injunction against interference with such reinstatement or other Government employment, and for supplementary relief (App. 15-16, 41-42).

Both plaintiff and defendants moved for summary judgment. The present appeal is from an order of the District Court of April 18, 1946, denying plaintiff's motion and granting that of the defendants (App. 72).

As stated in the opinion of the District Court (App. 71), the case presents no genuine issues of fact.

The facts set forth in the following statement are undisputed.

Plaintiff's Government Employment

The plaintiff is a natural-born citizen of the United States, resident in the State of New York. At the time of the commencement of this action he was thirty-four years of age. For a period of almost nine years, from October 21, 1935, to September 12, 1944, he was employed in Washington, D. C., by various agencies of the United States Government in different capacities. He started in 1935 as a research assistant in the Federal Works Agency at \$2,000 per year (App. 2), and advanced in positions of increased responsibility in that agency, in the Office for Emergency Management, and the War Manpower Commission (since transferred to the Department of Labor, App. 62), so that at the time of the termination of employment complained of, he was chief of the classification division of the War Manpower Commission at a base salary of \$4,600 per annum (App. 2). In this position he was directly responsible to the Director of Personnel of the War Manpower Commission. In the performance of his duties, he had the assistance of as many as eleven technical analysts subordinate to him, as well as a clerical staff. He was responsible for assuring that the positions of some 23,000 employees of the War Manpower Commission were properly allocated in accordance with the Classification Act of 1923 (5 U. S. C. § 661 et seq.) and other relevant salary classification acts. It is undisputed that the plaintiff in this position, as in all the other positions he has held in the Federal Government, had been performing highly satisfactory services, having at all times been rated as "very good" or "excellent" in the efficiency ratings required by law (App. 3-4).

Plaintiff's Dismissal and the Civil Service Commission's Reasons Therefor

Effective as of September 12, 1944, the plaintiff was separated from the employ of the War Manpower Commission and by separate letter of August 16, 1944, the

Civil Service Commission cancelled any and all of his pending applications and existing eligibilities (App. 4, 19). The plaintiff was concededly not separated because of the quality of his work, the only basis for his separation being a claim by the Civil Service Commission that he was ineligible to hold his office. Indeed, at the very time of plaintiff's dismissal, the War Manpower Commission official who effectuated the separation pointed out that the quality of the plaintiff's work was "uniformly of a high order" (App. 18).

The sole basis for the action of the Civil Service Commission was that the plaintiff had entertained certain views (in 1941, prior to Pearl Harbor) respecting America's participation in the European conflict, and had affiliated himself with an organization which reflected these views. The Commission's¹ letter to the plaintiff dated June 5, 1944, constituting its full statement of reasons for its declaring him ineligible follows (App. 7-9):

UNITED STATES CIVIL SERVICE COMMISSION
Washington, D. C.

File: BAR:JFE:GD
June 5, 1944

Mr. Morton Friedman
c/o Personnel Office
War Manpower Commission
Washington, D. C.

My dear Mr. Friedman:

Reference is made to your appearance before the Commission on April 19, 1944, in further prosecution of your appeal from the finding of ineligibility for continuance in the service.

The Commission has given most careful consideration to your case including the information developed during the course of the investigations which were made and the testimony before the Board of Appeals and Review at the hearing which was accorded you.

¹ The term "Commission" in this brief refers to the Civil Service Commission. Emphasis in quotations is supplied.

Particular attention, however, has been given to your statements and based upon those statements the Commission has concluded that the finding of ineligibility was in accordance with the standards applied in such cases and therefore has affirmed the previous action.

The Commission's action was based mainly on your activities in connection with the American Peace Mobilization and your shift in attitude and point of view following the declaration of war between Germany and Russia. It may be true that many members of the American Peace Mobilization were not aware that it was Communist-dominated and pro-Communist but it is generally recognized that those who were prominently and actively affiliated with that organization were people who over a period of time had shown sympathy with the Communist cause. Your testimony was that you were sent to the first meeting of the American Peace Mobilization in Chicago as a representative of your local union; that you also were sent to a meeting of the organization in New York City as a delegate, and that you participated actively in their meetings and affairs. You also testified that you were active in the affairs of the Washington Peace Mobilization and served on several of its committees.

You were admittedly opposed to the United States participation in war before the invasion of Russia by Germany but thereafter you changed your mind and were of the opinion that this country should fight along with the other United Nations. Just how long it was before Pearl Harbor that you changed your mind is not definitely established, but on the occasion of your appearance before the Commission you indicated that it was probably in August of 1941, which obviously was soon after June 22, 1941.

These matters, together with other activities which have been personally discussed with you, are convincing to the Commission that you are not eligible for retention in the service according to the standards observed by the Commission.

Very respectfully,

/s/ WILLIAM C. HULL
Executive Assistant.

From this letter it appears that the Commission directed plaintiff's dismissal because it disapproved of his opinions on the nature of this country's participation in foreign affairs at that time. No charge or finding was made that plaintiff's views were in any way unlawful, that he advocated the overthrow of the Government of the United States by force and violence or otherwise, or that he was a member of the Communist Party (App. 7-9, 13, 23). Nor was any charge or finding made that the American Peace Mobilization, which claimed a membership of 14,000,000 (App. 9-10), was an unlawful organization, or that the views which it represented were such that any individual who espoused them was guilty of an unlawful act. On the contrary, the Court may take judicial notice of the fact that this organization's opposition to participation in the war was shared by a large segment of the American people.²

*Steps Leading to Plaintiff's Dismissal—
Efforts of Office for Emergency Management
to Prevent Dismissal*

The action of the Civil Service Commission and of the War Manpower Commission culminated more than eighteen months of sharp disagreement among three Government agencies as to whether the plaintiff should be dismissed. Throughout this period of disagreement the two agencies by which the plaintiff was successively employed and which were obviously in the best position to determine whether he should be dismissed were strongly in favor of his retention. The following events marked this eighteen-month dispute.

² The 1940 platforms of both major political parties included planks opposing entry into the war.

The Republican platform provided that:

"The Republican party is firmly opposed to involving this nation in foreign war."

The Democratic platform read:

"We will not participate in foreign wars, and we will not send our Army, naval, or air forces to fight in foreign lands outside of the Americas, except in case of attack."

—New York Times, June 22 and July 18, 1940.

In or about October, 1942, while the plaintiff was employed by the Office for Emergency Management, the Civil Service Commission directed the Office to dismiss him (App. 31). That Office reviewed the Commission's charges, as well as the findings which resulted from an extensive investigation conducted by its own investigating division, and officially declared that the facts asserted by the Commission could not justify a dismissal (App. 32). Furthermore, it determined that it would be to the best interests of the Government to retain the plaintiff in its employ. Therefore it formally appealed the case to the Board of Appeals and Review of the Commission (App. 32).

*The Board of Appeals and Review
Recommends Exoneration of Plaintiff*

A "hearing" before the Board of Appeals and Review was held on January 26, 1943. The Board is a body subordinate to the Civil Service Commission and has no authority to overrule it. Under the procedure before that Board as applied in this case, no evidence is submitted against the employee. The case against him is based entirely upon an investigator's report, which is kept in the secret files of the Commission, is never shown or read to the employee and like all such reports, consists entirely of investigator's summaries of alleged statements of anonymous and unsworn informants (App. 37).³

A "hearing" so conducted is hardly conducive to any fair determination of the facts. Although the District

³ The record of this "hearing" contains the following statement by the Chairman of the Board of Appeals and Review:

"Incidentally, we have no more information than you do as to who the witnesses were, except in a very few isolated cases, and we don't know in some respects just how they came into possession of the information which they had given. It is not our investigation" (App. 37).

Plaintiff regrets his inability to include in the record on this appeal a transcript of the hearing before the Board of Appeals and Review. While he and his representative were allowed to see the transcript in the offices of the Commission and to transcribe some excerpts therefrom, the Commission by letter of January 11, 1945 specifically denied permission to make a copy of the transcript (App. 39, 42-43). The remainder of the record on which the Commission acted is, as noted above, in its secret files and was never made available to plaintiff or his counsel.

Court stated that "at said hearing plaintiff was given full opportunity to present for consideration all the evidence and testimony he desired on the question of his eligibility * * *" (App. 66), plaintiff was afforded no opportunity for fair hearing, confrontation and cross-examination of the informants against him. He did, however, present evidence which convinced the Board that he was a loyal, devoted and efficient public servant. Testimony to this effect was given by the following Government officials (App. 37-38):

Charles N. Mills, Director of Personnel,
Office for Emergency Management;

Richard W. Cooper, Chief of Personnel,
War Manpower Commission; previously with the
Office for Emergency Management;

Lester L. Evans, Acting Director of Personnel,
Federal Works Agency;

Major Fred Zappolo, formerly Director of Personnel,
Works Projects Administration; and, at the time
of hearing, engaged in personnel work in the
Quartermaster Corps;

Jay W. Murphy, formerly on the personnel staff of
the Works Projects Administration and, at the
time of the hearing, engaged in confidential work
in the Navy Department;

George Hamson, Assistant Director of Personnel,
Office for Emergency Management; and

John Ashman, Chief of Classification Division,
Office for Emergency Management.

The testimony of Messrs. Mills and Cooper on plaintiff's behalf was presented in their official capacities as representatives of their agencies (App. 38).

In addition, letters were presented from two individuals who were absent from Washington on official business at the time of the hearing and were therefore unable to testify in person. These individuals were:

Captain Arthur Schraeger, formerly on the personnel staff of the Works Projects Administration, and at the time of his letter, engaged in personnel work in the Quartermaster Corps; and

Elbert W. Smith, Assistant Director of Personnel, Farm Credit Administration (App. 38).

All these witnesses and writers of letters on plaintiff's behalf were personally acquainted with him through their association with him in the personnel work of the War Manpower Commission or in his previous employments enumerated above. As their titles indicate, they were responsible officials of the United States Government who, at the time of the hearing or previous thereto, occupied high-ranking personnel positions, and their official duties required them to be fully familiar with standards of suitability for Federal employment. Testifying with respect to their knowledge of plaintiff's conduct over a period of years, they all affirmed that he was a loyal, devoted and exceptionally valuable public servant; and that the opinions he may have had—and they were aware of his opinions—were those of an independent, loyal American citizen, exercising his right and his duty to think and express himself about the political issues of the day (App. 38-39).

Messrs. Mills and Cooper, who, as noted above, appeared officially on behalf of the Office for Emergency Management, described in detail the extensive investigation of the plaintiff which had been conducted by the special investigating division of that Office. These officials pointed out that they were fully informed of all the facts found by the Commission, and they were convinced that plaintiff should not be dismissed (App. 32). Furthermore, they pointed out that the plaintiff's services were most valuable and his replacement would be exceedingly difficult.

The Civil Service Commission's Board of Appeals and Review, after the hearing, recommended to the Commission

that it alter its views and permit the plaintiff to be retained (App. 32).⁴

The Commission Insists Upon Plaintiff's Dismissal—Efforts of War Manpower Commission to Prevent Dismissal

The Commission, however, reasserted its conclusion that the plaintiff should be dismissed. At this time the plaintiff was employed by the War Manpower Commission, to which he had been transferred as a result of a reorganization. The War Manpower Commission, acting wholly independently and without reference to the action previously taken by the Office for Emergency Management, referred the matter to a committee of responsible officials, including as one of its members the General Counsel of the War Manpower Commission (App. 32-33).

The War Manpower Commission, on the basis of the findings of this committee, concluded, as had the Office for Emergency Management and the Civil Service Commission's Board of Appeals and Review, that the facts found concerning the plaintiff did not justify his dismissal, and it requested the Civil Service Commission to reconsider its action. Duly authorized officials of the War Manpower Commission held many conferences with Civil Service Commissioners on the case. Finally, on April 19, 1944, the Personnel Director of the War Manpower Commission appeared personally, on behalf of the War Manpower Commission, with the plaintiff before the three members of the Civil Service Commission to appeal the case (App. 33).

Thus, two agencies of great importance in conducting the war program of this country—the Office of Emergency

⁴ This was revealed for the first time by an admission of counsel for the Commission in response to a question by the District Court at oral argument on the Government's motion to dismiss the complaint. But for the Court's question, the secret character of the record before the Commission would have resulted in the withholding of this vital information from the plaintiff and the Court.

The character of the record conceals from the plaintiff and the Court information of a similar nature, such as whether the Commissioners were unanimous in their determination to dismiss him.

Management, with complete responsibility for the administrative organization (including personnel functions) of every single emergency war agency, and the War Manpower Commission, dealing with major personnel problems of every factory and farm in the nation—after extensive independent investigation and serious consideration, determined that the retention of plaintiff in their employ was consistent with and in furtherance of their war functions. The Civil Service Commission, however, remained adamant in its position and directed the War Manpower Commission to dismiss the plaintiff. The War Manpower Commission finally acceded to this assertion of authority and took separation action effective as of September 12, 1944, solely on the basis of the direction of the Civil Service Commission and its own erroneous view that it had no choice other than to comply with such direction (App. 33).

Having exhausted all his administrative remedies (App. 66), plaintiff thereupon instituted this action for judicial relief. This appeal is from the denial of such relief by the District Court.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULE INVOLVED

The plaintiff asserts that his dismissal was in violation of the First and Fifth Amendments of the Constitution of the United States and of certain statutory provisions protecting Federal employees.

Section 2 of the Civil Service Act, Act of Jan. 16, 1883, 22 Stat. 403, 5 U. S. C., Sec. 633, provides:

“It shall be the duty of said commissioners (i.e., Civil Service Commissioners):

“First: To aid the President, as he may request, in preparing suitable rules for carrying this Act into effect, and when said rules shall have been promulgated it shall be the duty of all officers of the United States in the departments and offices to which any such rules

may relate to aid, in all proper ways, in carrying said rules, and any modification thereof into effect.

"Second: Among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:

* * * * *

"Fifth: No person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so.

"Sixth: No person in said service has any right to use his official authority or influence to coerce the political action of any person or body."

Pursuant to the said statutory provisions,⁵ the President, by Executive Order, has promulgated as part of the Civil Service Rule I, Section 2, the following (Executive Order No. 8587, Nov. 7, 1940, CFR, Cum. Supp. 1943, Book 2, p. 1439):

"No question in any form of application or in any examination shall be so framed as to elicit information concerning the political or religious opinions or affiliations of any applicant, nor shall any inquiry be made concerning such opinions or affiliations, and all disclosures thereof shall be discountenanced, except as to such membership in political parties or organizations as constitutes by law a disqualification for Government employment. No discrimination shall be exercised, threatened, or promised by any person in the executive civil service against or in favor of an applicant, eligible, or employee in the classified service because of race, or his political or religious opinions or affiliations, except as may be authorized or required by law."

Section 9(a) of the Hatch Act, Act of Aug. 2, 1939, 53 Stat. 1148, 18 U. S. C., Sec. 61h, as amended by Act of July 19, 1940, Sec. 2, 54 Stat. 767, provides:

⁵ See "Civil Service Act, Rules and Regulations Annotated" (U. S. Civil Service Commission, 1943), p. 216.

"All such persons (i.e., officers or employees in the executive branch of the Federal Government, or any agency or department thereof) shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates."

STATEMENT OF POINTS

I. The District Court erred in failing to give effect to Section 2 of the Civil Service Act, 22 Stat. 403, 5 U. S. C., Sec. 633; Civil Service Rule I, Sec. 2; and Section 9(a) of the Hatch Act, 53 Stat. 1147, 18 U. S. C., Sec. 61h, which guarantee to Federal employees freedom of political opinion, and erred in upholding the dismissal of a Federal employee in clear violation of the above statutory protections.

II. The District Court erred in upholding a political test of loyalty administratively developed by the Civil Service Commission and in constructing its own political test of loyalty, both in violation of accepted statutory and judicial standards of loyalty.

III. The District Court erred in failing to give effect to the provisions of the First and Fifth Amendments to the Constitution of the United States guaranteeing freedom of speech and of political opinion to all persons, including Federal employees.

SUMMARY OF ARGUMENT

I. Plaintiff's dismissal was in violation of the laws protecting Federal employees in the expression of their political opinion.

Administrative discretion in the discharge of a Government employee is not here involved; plaintiff's dismissal was in violation of specific statutory safeguards of his rights.

A. The statutes and rule broadly protect the political freedom of Federal employees.

The Civil Service Act, Civil Service Rule I, Section 2, and the Hatch Act broadly protect the right of plaintiff as a Federal employee to express his political views. The views so protected are not merely partisan political ones, but any views on political issues of the day. The only exception to this broad rule permits dismissal for advocacy of the overthrow of the Government; this exception is not applicable and is not claimed to be applicable to plaintiff.

B. Plaintiff was dismissed for his political opinions.

Plaintiff was in fact dismissed for his political views. The letter of the Civil Service Commission informing him of the reasons for his discharge so stated. The additional reason set forth—that he was a member of the American Peace Mobilization, a political organization—is no more than a charge that he shared the political views of that organization. Termination of Government employment on these grounds is prohibited by law.

II. By purporting to base their action on doubt as to plaintiff's loyalty, the Commission and the Court below unlawfully set up political tests for the holding of Government employment.

The Civil Service Commission, in attempting to conceal the political character of the dismissal here, has purported to base its action on a reasonable doubt as to plaintiff's loyalty. But even unpopular views on international affairs, and a fortiori plaintiff's views, which were widely held, do not warrant an imputation of disloyalty. The Court below made it clear that it based its decision on its own political views. Political orthodoxy, however, may not be officially prescribed, and may not be tested by the personal agreement or disagreement of an administrative or judicial officer.

- A. The evidence of plaintiff's loyalty was unquestioned; the Commission's disregard of it was based solely on its own political test of loyalty—a newly developed administrative test.**

Plaintiff's opinions showed no sign of disloyalty. The testimony as to his loyalty before the Commission's Board of Appeals and Review, given by representatives of the war agencies employing him and other officials, with full knowledge of the facts, was unquestioned. The Board, which observed plaintiff and the witnesses on his behalf and had access to the Commission's secret information concerning him, recommended his exoneration. The Commission, however, disregarded the undisputed evidence and its Board's recommendation and substituted its own political test of loyalty. Under this test, the loyalty of a citizen who at first believed America should not participate in the war and who changed his mind in the summer of 1941 was suspect.

- B. The Commission's standard of loyalty overlooks the fact that changes of individual views on issues of foreign policy are widespread and may legitimately be affected by events abroad; such changes supply no ground for doubt as to loyalty.**

The Commission's standard exposes innumerable citizens to a charge of disloyalty whenever they express any opinion on foreign affairs. The views of the public were in flux before America's entry into the war. Events bearing on foreign nations affected public opinion as to the timeliness and desirability of this country's belligerency. This has also been true in earlier American periods. American thought on foreign policy has been, is and presumably will be variously affected by actions and policies of other countries. No imputations of disloyalty can thereby arise.

- C. The test of loyalty of the Court below while differing from that of the Civil Service Commission is equally illegal.**

The District Court based its own test of loyalty solely on its approval or disapproval of the form of government of

foreign countries by which in its opinion the plaintiff might have been influenced in his views on foreign affairs. The Court thus makes it obvious that no question of loyalty to a foreign country is really involved, but that the whole issue here is an effort to force a degree of conservatism upon the thinking of Federal employees about domestic issues.

D. Statutory and judicial tests of loyalty supply no basis for the Commission's dismissal action.

The Civil Service Commission and the Court below have violated accepted statutory and judicial tests of loyalty. The statutory test of loyalty is, does one "support and defend the Constitution of the United States against all enemies, foreign and domestic?" (5 U. S. C., Sec. 16). Plaintiff's loyalty under this statutory test has not been questioned. Judicial tests of loyalty are broad and plaintiff's views do not contravene them. The War Service Regulation permitting dismissal of a Government employee for "reasonable doubt as to his loyalty" does not authorize the Civil Service Commission to invent a novel test of loyalty and, under its guise, to dismiss plaintiff for his lawful political views.

E. Plaintiff is not charged with having opinions and affiliations unlawful for Government employees.

The alleged sympathy with the Communist cause attributed to persons affiliated with the American Peace Mobilization, of which plaintiff was a member, does not justify his discharge. Plaintiff is not charged with membership in the Communist Party and it is undisputed that he did not advocate the overthrow of the Government. Dismissal based on sympathies ascribed to other members of the American Peace Mobilization unlawfully attributes their views to plaintiff and constitutes an extreme example of guilt by imputation.

II. The Civil Service Commission and the Court below violated the First and Fifth Amendments to the Constitution.

A. The Constitutional safeguards of political expression and affiliation apply to all citizens, including Government employees.

The right to free political expression and affiliation safeguarded to Federal employees by statute is also derived from the First and Fifth Amendments. The rights under these Amendments apply to Government employees equally with other citizens, and the Civil Service Commission violated them in its dismissal.

B. The Constitutional safeguards are violated where conditions not reasonably related to Government employment are sought to be attached to it.

Government employment is not a privilege to be granted or withheld on a discriminatory basis administratively established. Even if it were a privilege, the doctrine of unconstitutional conditions would prohibit the imposition of tests not reasonably related to employment qualifications, such as adherence to political views considered proper by a Government agency.

ARGUMENT

POINT I

The plaintiff's dismissal was in violation of the Civil Service Act, Civil Service Rule I, Section 2, and the Hatch Act.

This case involves a clear violation of law. The question of administrative discretion, such as might ordinarily be raised in a case of an employee dismissed on the grounds of alleged inefficiency, is not present here. Whatever may

be the extent of authority of a Government agency when acting within an area of discretion marked out by a statutory grant of power, it cannot, by purporting to exercise discretion, commit acts which are clearly outside the limit of such powers, and which are expressly forbidden to it by statute. The power of the Court to afford relief to a Federal employee dismissed illegally is well established. *United States v. Wickersham*, 201 U. S. 390, 26 S. Ct. 469 (1906); *Borak v. Biddle*, 78 App. D. C. 374, 141 F. 2d 278 (1944), cert. den., 323 U. S. 738, 65 S. Ct. 42 (1944).

In addition to the statutory questions presented by the case, there are also raised basic constitutional issues. There is involved the power of the Government to discriminate in the selection and retention of employees on the basis of their political thoughts and affiliations, and impliedly on the basis of their color and religious beliefs. The constitutional questions are discussed *infra*, pp. 42-47. We desire here merely to point out that these constitutional issues can be avoided only if the statutes involved are interpreted in accordance with the contentions we here advance.

The District Court held that admitted statutory safeguards of the rights of Federal employees were here inapplicable because it asserted that reasonable doubts existed as to the plaintiff's loyalty. In support of this assertion, it pointed to the fact that he opposed American participation in the European war when England alone was involved, but changed his view when Russia too became a belligerent. In so ruling, the Court erroneously brushed aside the basic safeguards to the freedom of thought of Government employees, long recognized under applicable statutes. In order to remove the case from the scope of these protective laws, it injected a test for the loyalty of Federal employees by comparing it with its own political views, set forth in its opinion. In so doing, it ignored the test of loyalty prescribed by statute and promulgated one which tests not loyalty but the extent of plaintiff's disagreement with the Court's and the Commission's political views.

Adopting this standard, it applied it to a person against whom there is not the slightest evidence of any act or word normally considered an element of disloyalty. There is absolutely nothing in the record indicating acts such as contact with a foreign power, divulgence of official secrets, advocacy of the overthrow of the Government, etc. What the record demonstrates is that plaintiff, a Federal employee of nine years' service, whose fellow workers and supervisors, knowing all the facts about him, considered him a devoted, efficient and loyal public servant, held a political opinion at variance with that of the Commission and the Court below.

We proceed now to show (a) that plaintiff, like all Federal employees, was broadly protected in the expression of his political opinions by the statutes, and (b) that these statutes have been violated in his dismissal. We shall then show that the political tests employed by the Court below in their charges of doubt as to plaintiff's loyalty does not alter the fact that he was dismissed for reasons prohibited by law.

A. The Civil Service Act, Civil Service Rule I, Section 2, and the Hatch Act extend broad protection to Federal employees to hold and express opinions on political matters and to affiliate themselves with organizations expressing political opinions.

The Civil Service Act, as implemented by Rule I, Section 2, protects the right of Federal employees against discrimination because of political opinions or affiliations.

This objective was at the heart of the whole movement for the civil service in this country. Under the spoils system Federal employees were commonly selected and dismissed because of their political opinions or affiliations. The Civil Service Act was adopted to put an end to the testing of fitness for office on these grounds.

In protecting the fundamental rights of Federal employees to hold and express political opinions, the Congress was thinking not merely of the political differences inherent

in the two-party system in this country or of relatively minor differences in political opinions. It sought to protect the broad right to hold political opinions, whether partisan or non-partisan, and without regard to the extent to which such views differed with those of any Government official. And Civil Service Rule I, Section 2, which puts into effect the Congressional mandate, is explicit and forceful in upholding this right.

An eloquent illustration of the breadth of political freedom envisioned by the civil service reform movement which culminated in the Civil Service Act is the statement of the Civil Service Commission made in 1871 on the issue of employment in the Federal service of those who had supported the South during the Civil War and were considered as former enemies of the Government. The Civil Service Commission then said:

"If it be further objected that to open the opportunity to all qualified applicants is to give the late enemy of the government the same chance to serve it with the citizen who offered his life in its defense, the reply is, that it would be a fatally unwise policy to perpetuate proscription in a reformed civil service. Such a policy would stimulate slander and reward falsehood. It would incite every disappointed applicant and his friends to charge a successful individual with continued hostility to the government, and the Civil Service would become the hot-bed of passions which patriotism and wisdom alike seek to allay." (Report of the Civil Service Commission to the President, December 18, 1871. Senate Ex. Document No. 10, 42nd Congress, 2nd Sess. (1871), p. 14.)

The Government's present-day interpretation of the extent of protection afforded by the statutes is, except for the present case, similarly broad. Thus, in its brief before the Supreme Court of the United States, submitted in November, 1945, in *United Federal Workers of America v. Mitchell*, No. 34, October Term, 1945, not yet decided,⁶ the

⁶ The Court heard argument December 3, 1945. Reargument before a full bench has been ordered. U. S., 66 S. Ct. 20, 330, 812, 1007 (1946).

Government emphasized the freedom of Federal employees to hold and express political views not related to partisan political activity. Thus, at page 32 of its brief in that case, the Government stated:

“Nor does the exercise of legislative control over the partisan political activity of officers and employees impose upon them a condition of weak neutrality as to public questions in either their personal or their official capacities. They may entertain and publicly and privately express vigorous personal views upon significant issues; and in their official relations their work and their advice may benefit from strong convictions frankly stated. A single channel of expression and activity—namely political management and partisan participation in election campaigns otherwise than in a rank-and-file capacity—is alone denied to them for reasons of public policy.”

Similarly, the enactment of the third sentence of Section 9(a) of the Hatch Act, quoted above, p. 12, was a reaffirmance (except for partisan activity) of the broad latitude guaranteed to Federal employees in the voicing of their opinions and their expression of political activity. This is emphasized by an especially relevant passage from the Government's brief in *United Federal Workers of America v. Mitchell*, *supra*, at pp. 34-35:

“That sentence specifically permits all persons covered by the section to express their opinions, publicly as well as privately, on all political subjects and candidates. They may do so singly or in concert, at all times and places except in circumstances which cause their activity to assume the character of taking an ‘active part in political management or in political campaigns’, and still retain their employment.”

It is thus plain, from the very existence of Civil Service as an institution, from its history, from recent legislation, and from recent interpretation of the law by the Government itself, that Federal employees are not to be discriminated against because of their political views or affiliations,

irrespective of whether such views or affiliations meet with the approval of the Civil Service Commission or any other official.

* * * * *

There is only one exception, we believe, to this broad rule, which we shall now briefly discuss. Neither the Commission nor the Court below has asserted that the plaintiff falls within this exception.

Civil Service Rule I, Section 2, as noted above, prohibits inquiry into the political opinions or affiliations of Federal employees or the exercise of discrimination because of them, "except as may be authorized or required by law". The only political opinions whose espousal constitutes by law a disqualification for Government employment, and the only organizations membership in which constitutes such a bar, are those referred to in Section 9A of the Hatch Act and the provisions of certain appropriation acts, referring to advocacy of the overthrow of the Government.⁷

Neither the Commission nor the District Court stated, or even suggested, that the plaintiff in this case advocates the overthrow of the Government of the United States or is a member of an organization advocating such overthrow.

* * * * *

Apart from the foregoing exception, here inapplicable, Federal employees, including the plaintiff, are guaranteed by statute the right to express their views, publicly and privately, on any non-partisan political issue and to affiliate themselves with organizations in support of their views.

⁷ Section 9A of the Hatch Act makes it unlawful

"for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States" (53 Stat. 1148, 18 U. S. C. § 61i(1)).

Appropriation acts in the past few years (and for the period involving the employment of the plaintiff) have contained a clause which bars the use of appropriated funds to pay the salary or wages of any one who advocates or is a member of an organization which advocates the violent overthrow of the Government of the United States. *U. S. v. Lovett*, ... U. S., 66 S. Ct. 1073, at 1075, n. 2 (1946).

Under the Civil Service rule such expressions and affiliations may not be inquired into, and under the statute and the rule may not constitute ground for dismissal from Federal employment or for other penalties or discriminations.

B. The plaintiff in this case was separated from the Federal service because of his political opinions and affiliations.

The reasons for the plaintiff's dismissal as stated in the letter of the Civil Service Commission, *supra*, pp. 3-4, were (1) that he changed his mind between June and August of 1941 on the political issue of participation by this country in the war in Europe, and (2) that he was affiliated with an organization which expressed a point of view on this issue.

(1) It would hardly need argument to show that the substance of the charge against the plaintiff is the holding of certain political opinions and affiliations. The Civil Service Commission in so many words accused the plaintiff of having "changed your mind" (*supra*, p. 4) between June and August, 1941, on the question of American belligerency. No one will suggest that this was anything but a political opinion. A glance at the Congressional Record during those days will indicate that this was, in fact, the most vital political issue of the day.

(2) The charge of membership in the American Peace Mobilization is a charge that the plaintiff held the political views of that organization. The American Peace Mobilization was a political organization which expressed a view relating to participation in the war. The plaintiff was a member of that organization because at the time it expressed his views. Dismissal on this ground is equally a dismissal for political views.

Any doubt upon this point is dispelled by the message of President Roosevelt to the Congress concerning limitations placed upon the continued Federal employment of Messrs. Lovett, Dodd and Watson (H. Doc. 264, 78th Cong., 1st

Sess., 1943). A rider to an appropriation act, 57 Stat. 450, in effect prohibited their continued employment because a committee of the House had found that they had been affiliated with so-called Communist-front organizations.⁸ Indeed, according to the committee, *Dr. Lovett had admitted membership, association or affiliation with the American Peace Mobilization, the very organization here in question.*⁹

The President in his message to Congress expressed strong disapproval of its action. He wrote (H. Doc. 264, 78th Cong., 1st Sess., 1943, p. 1):

"If it had been possible to veto the objectionable rider * * * without delaying essential war appropriations, I should unhesitatingly have done so. * * * There is no suggestion that the three named individuals have not loyally and competently performed the duties for which they have been employed. *They are sought to be disqualified for Federal employment because of political opinions attributed to them.*"

⁸ The legislative history of the rider appears in *U. S. v. Lovett*, ... U. S., 66 S. Ct. 1073 (1946).

⁹ H. Rep. 448, 78th Cong., 1st Sess., 1943, p. 9.

According to the committee, Dr. Lovett also admitted membership, association or affiliation with the American Youth Congress, the League of American Writers, National Committee for People's Rights, National Federation for Constitutional Liberties, and International Labor Defense. *Id.*

The committee further found as follows (*ibid.*, at p. 10):

"Dr. Lovett was also a member or affiliated with the National Committee of the American Civil Liberties Union; National Committee, American Birth Control League; National Committee, All-American Anti-Imperialist League, which helped finance the Nicaraguan revolution against the American marines in 1930; National Council of the Committee on Militarism in Education, which opposes military training; International Committee for the Defense of Political (red) Prisoners; president of the League for Industrial Democracy; one of the editors of the *New Republic*; National Committee, American League for India's Freedom; signer of Fellowship of Reconciliation petition for recognition of Russia; advisory board of Russian Reconstruction Farms; arrangements committee for United States Congress against War; American Committee for Struggle against War; National Committee of League against Fascism; National Committee, International Labor Defense; endorser, national convention of Friends of Soviet Union; advisory committee, American Committee for Protection of Foreign Born; executive committee, Farmer Labor Political Federation; League for Mutual Aid; advisory editor, *Champion of Youth*; general committee, Friends of Spanish Democracy; sponsor of mass celebration in honor of the Communist, Mother Bloor; advisory committee, American Youth Congress; endorser, Conference of China Aid Council, 1928; defended Soviet purges and killings of objectors in Russia, 1938."

The rider to the statute resulted in litigation, and was ultimately declared unconstitutional as a bill of attainder. *U. S. v. Lovett*, supra, n. 8.

The Lovett-Watson-Dodd situation is in every respect similar to the case at bar. Political opinion and organizational affiliation were there sought to be made the test of the right to hold public office. And in the case of Dr. Lovett, at least, such affiliation was not of a minor or casual character. As the House committee found, in the extract from its report quoted in footnote 9, supra, he was connected with many of these organizations in important policy-forming capacities. Nevertheless, the President treated such associations solely as an expression of the political opinions of the three individuals, and strongly protested their ouster.

He pointed out further that no suggestion had been made that they had not "*loyally* and competently" performed their official duties (H. Doc. 264, supra, at p. 1). Their Government agencies "were fully satisfied with the quality of their work and wished to keep them employed on their jobs." _____ U. S. at _____, 66 S. Ct. at 1073. The parallel with this case is complete.

It is thus clear that in causing plaintiff's dismissal because of a change in his view on a political issue and because of his membership in an organization expressing a view on a political issue, the Commission was discriminating against him by reason of his political views and affiliations, contrary to law.

POINT II

The Commission and the District Court in an attempt to veil the political character of plaintiff's dismissal, purported to base their actions on a "reasonable doubt" as to his "loyalty".

Notwithstanding the clear statutory ban on removals for political opinions and affiliations, the Commission and the Court below have attempted to construct novel and dangerous political tests to justify plaintiff's dismissal. Proceeding from the undoubted authority to dismiss the disloyal in time of war, the War Service Regulations¹⁰ authorize removal of an employee where there is "a reasonable doubt as to his loyalty to the Government of the United States". Even assuming the validity of such a subjective test of loyalty as "doubt" in the mind of an official, this hardly justifies the position here taken. The Government contends that such doubt exists with respect to the plaintiff solely because of his political opinions as described in the letter of the Commission. The propriety of this conclusion was sustained by the District Court (App. 69-70). The error of the District Court's opinion appears most clearly when contrasted with the broad libertarian views of the Supreme Court on freedom of opinion.

In *West Virginia v. Barnette*, 319 U. S. 624, at 642, 63 S. Ct. 1178, at 1187 (1943), the Supreme Court said:

"If there is any fixed star in our Constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. * * * If there are any circumstances which permit an exception, they do not occur to us."

¹⁰ CFR, Title 5, Cum. Supp., Ch. I, Part 18.

In *Schneiderman v. U. S.*, 320 U. S. 118, at 145-146, 63 S. Ct. 1333, at 1346 (1943), the Supreme Court said:

"We should not hold that petitioner is not attached to the Constitution by reason of his possible belief in the creation of some form of world union of soviet republics unless we are willing so to hold with regard to those who believe in Pan-Americanism, the League of Nations, Union Now, or some other form of international collaboration of collective security which may grow out of the present holocaust. A distinction here would be an invidious one based on the fact that we might agree with or tolerate the latter but dislike or disagree with the former."

The Supreme Court in the *Schneiderman* case thus specifically held, in passing on the issue of attachment to the Constitution of the United States, that it was necessary to exclude from consideration the question of whether an individual's opinions found ready acceptance or strong repulsion by the Court. Views of broadly differing latitude, including even those on international politics held by Schneiderman, a prominent officer of the Communist Party, 320 U. S. at 126-127, 63 S. Ct. at 1337, were within the limits of judicial tolerance. The Supreme Court recognized that opinions with which the Court or even a large segment of the American population might take violent political issue could nevertheless not be held to brand their advocate as lacking in attachment to the principles of the Constitution. Whether or not a court or other official body regarded those views with disapproval was specifically forbidden as a test of loyalty.

In contrast to the tolerance which the Supreme Court held was embodied in the Constitution, the District Court's opinion on its face shows that its judgment was based on its personal disapproval of the plaintiff's opinions. Its departure from sound principle becomes even more obvious when one observes the extent to which the District

Court interjected its own political views in disapproving those of the plaintiff. According to the Court below:

"It can hardly be said that there could be no reasonable doubt of the loyalty of a member of a communist organization who opposed war against Germany, so long as this country was an ally of Great Britain, a democracy, but became an advocate of war when this country became allied with Russia, a communist and totalitarian state" (App. 70).

This statement itself is shot through with the Court's subjective political assumptions. Thus, for example, the statement that this country, *prior to its actual belligerency*, was an ally of Great Britain and then of Russia is not a legal but a political conclusion, permitting of disagreement. Further, the Court's assumption that the political complexion of a foreign power is a valid basis for determining whether or not the United States should enter the war on its side is itself a political question. The terms "democracy", "communist" and "totalitarian" used by the Court are the catchwords of our time, words of political honor or smear, or weapons of political attack, but in no case are they terms of legal significance.¹¹ Thus the Court's judgment that Great Britain is a democracy is a political judgment as to which some dissent exists, not a judicial truth.¹²

¹¹ A few examples of the current usages of these terms make this clear: According to the New York Times, July 17, 1946, p. 15, "Carroll Reece, Republican National Chairman, accused President Truman's Administration last night of 'economic cannibalism', of engaging in a 'political shell-game and of faithfully following Marxian precepts designed to impose a *totalitarian* Government on the people of the United States'."

A United Press dispatch appearing in the New York World Telegram of August 10, 1946 quotes Senator Bilbo as follows: "Sen. Taft, as you know, is a very strong Republican, and he has played every string on the instrument in his effort to line up the Pinks and the Reds and the off-brand of the political life of America, to further his interest as a candidate for the Presidency of the United States."

Senator Taft on the other hand is quoted by the New York Times, Jan. 5, 1946, p. 2, as referring to the program of President Truman as "Communist" and "left-wing" and referring to one plank of the President's program, he charged: "The proposal came directly from the Soviet Constitution, the Communist platform and from the C. I. O."

¹² Pro, Rt. Hon. Lord Josiah Wedgwood, "Testament to Democracy" (1943), 1; con, *ibid.* pp. 326-327. See also "Nehru, Toward Freedom" (1941) where the present head of the Government of India discusses democracy in Great Britain p. 123, and in India pp. 132-138, 222.

The same is true of its characterization of Russia's economic and political system.¹³ Nevertheless the Court felt no hesitation in basing its decision on its own political views on these subjects and in agreeing with the Commission that the loyalty of a dissenter from those views was, by virtue of his dissent, open to question.

Moreover the District Court rendered the protective provisions of the Hatch Act ineffective and futile. It agreed that, under the Act, "Federal employees retain the right to express their opinions on all political subjects to the same extent as other citizens" (App. 70). But instead of giving effect to the statutory protection of such opinions, it held that the Hatch Act did not prohibit plaintiff's removal from office if his opinions created doubt as to his loyalty in the minds of the Civil Service Commissioners (App. 70). The safeguard afforded by the Hatch Act to free non-partisan expression and affiliation thus is reduced to nothingness when those in authority resort to the subterfuge of questioning a Federal employee's loyalty.

We submit that a dispassionate and non-political appraisal of the fundamental issues in this case will demonstrate the violations of law here complained of, which a charge of disloyalty does not conceal. Such an approach, as distinguished from that embodied in the opinion of the Court below, is necessary if the guarantee to Federal employees of their political freedom is to be given effect.

¹³ As counterposed to the position taken by the Court below, which undoubtedly could be amply documented, contrary views have also been expressed by individuals of repute. Thus I Webb, Sidney and Beatrice, "Soviet Communism: A New Civilization" (1936) 419 et seq. devotes a chapter to an effort to answer the question, "Dictatorship or Democracy" as applied to Russia. These eminent British economists, after a detailed study of the matter, conclude that accepted terminology such as "aristocracy", "oligarchy", "democracy" and "dictatorship" are not applicable and suggest that there may actually be emerging in Russia a "new civilization" not fitting into any existing pattern. *Id.* at 450. See also, John Strachey, the present Minister for Food in Great Britain, in his book, "The Theory and Practice of Socialism" (1936), p. 47 et seq.

A. The plaintiff's political views and the evidence of his loyalty.

Plaintiff asserted before the Civil Service Commission and still asserts that, under Civil Service Rule I, Section 2, his opinions were not properly subject to official inquiry. He has never denied the views he held, however, and he voluntarily explained them at the hearing of the Board of Appeals and Review.

Plaintiff was generally opposed to this country's participation in the war in Europe prior to the summer of 1941. He changed his mind at that time, and one of the facts influencing him was the involvement of Russia in the war. He felt this to be a significant factor for several reasons. Among them was his belief that the attack on Russia left the United States the last remaining neutral power of any size; that if Russia and Great Britain were defeated, as did not appear completely improbable in the summer of 1941 (and for a considerable time thereafter), he had grave doubts whether this country could alone resist Nazi domination; and that the entry of the United States into the war at that time therefore became inevitable and imperative. Another of his reasons was that Russia's defense of her western borders gave Japan greater freedom to continue its aggressive activity in the Far East, directed among other things toward American outposts. He repeatedly stated that his only interest was the safety of the United States and that he felt that the objective facts of the international situation changed, in so far as the safety of the United States was concerned, when Russia became involved in the war.

These political opinions of the plaintiff nevertheless led to a decision by the Commission, confirmed by the Court below, that the plaintiff's loyalty was doubtful. In essence, the Commission's test of loyalty is that any person who prior to the summer of 1941 believed it desirable to remain out of the war in Europe and who changed his mind during the summer of 1941 may be a disloyal person. The fear is (a) that such a person may have changed his views because of Russia's engagement in the war, and (b) this then is

interpreted into an allegation of his greater concern with the interests of Russia than with those of the United States.

As applied to the plaintiff, this last interpretative twist as to his excessive interest in a foreign power has not a shred of evidence to support it. It is derived entirely from the political thoughts of the members of the Commission, and was sustained, as we have shown, solely on the basis of the political views of the District Court.

As opposed to these subjective political considerations on which the Commission and the Court below acted, the plaintiff presented the clearest evidence of his loyalty, none of which has been disputed. We have listed above (p. 7) the witnesses before the Commission's Board of Appeals and Review, their Government positions, their eminent qualifications for judging suitability for Government employment, their familiarity with the plaintiff's views, and their sworn convictions of his loyalty. We have noted that the Director of Personnel of the Office for Emergency Management and the Chief of Personnel of the War Manpower Commission testified officially as representatives of their agencies, which had themselves conducted extensive investigations of the plaintiff.

Not only is the plaintiff's loyalty borne out by this testimony, but as well by the very conduct of the Civil Service Commission, the Office of Emergency Management and the War Manpower Commission in the handling of this case.

1. The Civil Service Commission points out (App. 51) that it was its "usual policy" to permit persons charged with disloyalty to remain on their jobs pending administrative appeal. It must seem strange that the Commission, on the one hand, contends that it was dealing with dangerous and disloyal elements who must be removed from any opportunity to impede the war effort and, on the other hand, established procedures which in this case kept plaintiff in the employ of the Government for almost two years after the Commission made its decision. It is perfectly obvious from this fact alone that something other than disloyalty is here involved.

2. Moreover, no amount of political theorizing by the Commission or by the Court below can hide the simple truth that the Office for Emergency Management and the War Manpower Commission, the agencies by which the plaintiff was employed—agencies which were fighting the war at least as directly as the Civil Service Commission—were urgently seeking to retain plaintiff in their employ. These agencies, after making independent investigations of the whole matter, appealed, together with the plaintiff, in an effort to change the Commission's decision (App. 5).

3. In addition, the War Manpower Commission, acting through its duly authorized Personnel Director, joined plaintiff in a personal appearance before the Civil Service Commissioners on April 19, 1944, in an effort to cause a change in their attitude (App. 33, 60).

4. Furthermore, even the Civil Service Commission's own Board of Appeals and Review, after hearing the plaintiff's appeal, personally observing the witnesses and the plaintiff testifying under oath, and having access to all the secret "information" in the files of the Commission, recommended to the Commission that it alter its views and permit the plaintiff to be retained.¹⁴

5. Finally, the final letter of the War Manpower Commission (App. 60-61), pointing out that Mr. Friedman's dismissal would have to be delayed about a month "due to unfinished work in Mr. Friedman's division", suggests that it was more important for the war effort to retain the plaintiff than to dismiss him. And the Civil Service Commission, despite its definite conclusion as to plaintiff's doubtful loyalty, acquiesced in the delay.

All of which makes it perfectly obvious that plaintiff was neither disloyal nor dangerous. He was discharged simply because he held certain political views at variance with those thought to be proper by the Civil Service Commissioners.

¹⁴ Supra, pp. 8-9.

B. The Commission's political test of "loyalty" would justify a charge of disloyalty against practically any view on foreign affairs.

The standard devised by the Commission exposes to the imputation of disloyalty the views of innumerable citizens whenever they express any opinions on foreign affairs, especially on an issue at once as profound and as delicate as American participation in a war. The Commission's standard would charge anyone with disloyalty if he changed his position to that of advocacy of American participation shortly after the entry of any foreign power or a change of its fortunes in a war.

But an analysis of public thought prior to America's entry into the war indicates a shift in attitude on the question of American participation in the war not only by plaintiff but by large segments of the American public. It is hardly necessary to recall that in the '30's the dominant American view counseled keeping out of European affairs. Neutrality Acts were passed by the Congress, designed to insure that result. As the menace of Germany and Japan to the United States loomed larger, and as the issues of the European War became more immediate to the American people, public opinion underwent a change. The change, of course, did not occur overnight or uniformly in the whole population. It had its ups and downs depending upon the fortunes of the Allied powers and the strength or weakness shown by Germany. For various reasons individuals changed their minds at various times.¹⁵

¹⁵ On the question of the United States entering the war against Germany and Italy, the Gallup Poll of February 2, 1941, appearing in the Washington Post of that date, gave the following tabulation:

	<i>For Entrance Into the War</i>
October, 1939.....	5%
June 2, 1940.....	16%
June 14, 1940.....	19%
July 6, 1940.....	19%
July 19, 1940.....	15%
October 19, 1940.....	17%
December, 1940.....	12%
February, 1941.....	15%

The significant drop from October to December, 1940, is explicable only by the first successes of the British forces in Africa and the success of the Allies against the Italian forces in Greece. The drop in war sentiment from July 6 to July 19, 1940, has an entirely different though hardly conflicting basis, i.e., the disappointment at the capitulation of the French Government. Of course this same capitulation caused a contrary reaction upon some persons.

Thus, for example, Judge Jerome N. Frank of the Second Circuit, in his book, "If Men Were Angels" (1942), p. 332, note, said:

"The writer in 1938 published 'Save America First', which was, in part, a plea for American (western hemispheric) isolation. The demonstrated military might of the Nazis persuaded the writer, immediately after the fall of France, that America, if isolated militarily, would be in grave military danger. He, therefore, reluctantly changed his mind and, on several occasions, so stated publicly."

The distinguished constitutional lawyer, George Wharton Pepper, who until 1940 opposed American participation in the war, changed his mind in that year, explaining his altered views in his autobiography, "Philadelphia Lawyer" (1944), 272-273:

"All through 1940 the unreasoning call of the blood grew stronger as the position of Britain became more perilous. . . . May saw the Netherlands overrun. The 'Nine Days Wonder' at Dunkerque quickened my admiration. When the collapse of France in June left Britain standing alone I was deeply moved. When the night raids on London began in August and continued thereafter with fierce intensity, I began to feel as if my own home were being bombed. Finally, when the British people, after intense suffering and strain, were found to be about equally divided on whether reprisals would be justified, I gave myself up to the luxury of unrestrained emotion. I said, 'These people deserve to win; and we must help them do it'."

Views such as these, to which there could easily be added expressions of many other Americans, obviously do not render suspect the loyalty of their authors. Yet, unless one establishes an "invidious distinction" (*Schneiderman v. U. S.*, supra, p. 26) between the reaction of one person to France or Great Britain's role in the war, and the reaction of another person to Russia's, the Commission would be compelled to consider those persons disloyal.

The significant point for present purposes is that events abroad, either in sum or in specific incidents, affected individual thinking on America's position in the war. There were undoubtedly Americans whose views on our country's participation were colored and occasionally even determined by events in China since 1931, Ethiopia since 1935, Spain since 1936, Austria, Czechoslovakia, Poland, England, France or Russia. But it can hardly be construed as disloyalty that one's opinions on foreign policy were molded by the impact of the war on foreign countries. How else can an opinion on foreign policy be formed?

This is as true historically as it is today. In the early years of the Napoleonic Wars, Jefferson adopted a policy of neutrality, and the Federalists, who were anxious to involve the United States on Great Britain's side, called him a tool of Napoleon. Henry Adams wrote (4 History of the United States During the Administration of Jefferson and Madison (67):

"The interests of the Federalists required them to assert the subservience of Jefferson to France. They did so in the most positive language, without proof, without attempting to obtain proof."

Napoleon's increasing strength, however, culminating in his attack on Russia, caused a complete reversal in Jefferson's views. Early in 1814 he wrote (14 Lipscombe and Bergh, The Writings of Thomas Jefferson (1903) 43):

" * * * Surely none of us wish to see Bonaparte conquer Russia, and thus lay at his feet the whole continent of Europe. This done, England would be but a breakfast * * *. No. It cannot be to our interest that all Europe should be reduced to a single monarchy * * * " 16

¹⁶ With the substitution of the name "Hitler" for "Bonaparte" and the phrase "Nazi dictatorship" for "monarch", this line of reasoning was held by the plaintiff and was in fact presented by plaintiff in a statement of his views before the Commission's Board of Appeals and Review, *supra*, p. 29.

It is perhaps interesting that Jefferson found no hesitancy in changing his position again to that of support of Napoleon, when in his opinion the latter again championed the "rights of every people to independence and self-government" (14 Lipscombe and Bergh, p. 345).

It is absurd at a time of rapid flux of foreign policy to raise a question of disloyalty because of changing views as to the interests of the United States, when all that an individual is doing is altering his views in accordance with his understanding of the current international situation. Whether plaintiff here was right or wrong in his understanding, or in the importance he attributed to any event or series of events in contemporary world affairs, is, of course, not at issue here. Nor is it a matter with which the Civil Service Commission can, under the law, properly concern itself. It is sufficient for our purposes that many citizens, of high and low estate, formulate their views on foreign policy by reference to positions taken by, or events affecting, one or more foreign powers and no imputation of disloyalty can arise therefrom. Indeed the facts show that within three weeks of Germany's attack on Russia—an event which, in the view of the Commission, should not have been taken into account by Federal employees in formulating their opinions—8 per cent of the American people reacted in the same manner as did the plaintiff.¹⁷ Eleven million American people cannot be declared disloyal by administrative fiat.

The truth of the matter is that any thinking about America's best interests in the light of the international

¹⁷ The Gallup Poll appearing in the Washington Post of July 11, 1941, reports replies on questions as follows:

Has the new war between Germany and Russia changed your attitude toward helping Britain?

Yes: 12%

No: 83%

Those who answered "yes" were asked the second question:

Are you now more in favor or less in favor of aiding Britain?

More in favor: 8%

Less in favor: 4%

The start of the Russo-German war appears to have affected the minds of millions of Americans not only on the European war but also on their attitudes toward Japan. Thus the Gallup Poll in the Washington Post of September 7, 1941, reported the following answers to the question:

Should the United States take steps now to keep Japan from becoming more powerful, even if it means risking a war with Japan?

	<i>Willing to risk</i>	<i>Unwilling</i>	<i>Undecided</i>
Late July survey.....	51%	31%	18%
September survey.....	70%	18%	12%

situation, in the past, at the present time, and, especially, in the future, may legitimately be affected in varying ways by the actions and positions of other countries, particularly of our war-time allies. And any effort of the Commission to force Federal employees to blot out of their minds any of these factors is as unrealistic as it is unlawful.

C. The political test of loyalty developed by the Court below, while differing from that of the Commission, is equally illegal.

As we have noted, the loyalty of an individual is suspect under the Commission's test if he believed it necessary for America to participate in a war shortly after a foreign country had become involved. The Commission's views appear to be based upon the fear of a superior loyalty to the foreign power. The question which occurs immediately is whether this suspicion arises where the individual was affected by the participation, say, of Great Britain, France or China, or whether it is reserved for those affected by the involvement of Russia.

The Commission does not seem ever to have replied to this question publicly. The Court below, however, answered it squarely: The objection to the plaintiff was that he believed war necessary not when Britain but when Russia was involved. The Court indicated very clearly that it did not consider it inconsistent with loyalty to the United States to support Great Britain against Germany, but did consider it inconsistent to support Russia (App. 70).

This makes it plainer than ever that the problem is one of politics, not of loyalty. An individual's loyalty is presumably equally suspect if he divides it between this country and England as well as between this country and Russia. But the Court in applying the term "democracy" to Great Britain and "communist and totalitarian" to Russia clearly set up as a test whether or not plaintiff's views were affected by the belligerency of a country of whose internal form of government the Court approved.¹⁸

¹⁸ This line of reasoning appears to be based on the silent assumption that a military alliance implies sympathy with an ally's form of government. But cf. the quotation from *Bridges v. Wixon*, *infra*, p. 41.

It would seem then that the Court's decision was not based on the possibility of plaintiff's alleged partiality for *some* foreign power but on the possibility that he might be tolerant toward some of Russia's theories of government and in consequence perhaps "radical" in his views on domestic issues. On the other hand, one who was sympathetic with Britain's wartime form of government would presumably be sufficiently "conservative" on issues of domestic policy and therefore unexceptionable as a Federal employee.

This clearly has nothing whatsoever to do with loyalty, for it is concerned only with political thought. The Court has here embarked on control of degrees of "conservatism" and "radicalism" which are incompatible with political freedom.

D. The Civil Service Commission and the Court below have violated statutory and judicial tests of loyalty.

The susceptibility of every thinking American to a charge of disloyalty under the Commission's test, and the use of a charge of disloyalty to enforce a prescribed degree of conservatism upon Federal employees under the test of the Court below, are the direct result of the imposition of tests of loyalty foreign to the American way of thinking.

We do not doubt the right to disqualify Federal employees because of disloyalty. But to stretch differences of political opinion into doubts as to loyalty is administrative and judicial tyranny. The guarantee of freedom of political opinion would indeed be meaningless if it is subject to evasion by the simple expedient of terming certain opinions disloyal. The tendency to regulate opinions by terming them disloyal is the earmark of a dictatorship; the whole conception of the bill of rights revolves about the equal loyalty of divergent political opinions.

For all opinions there is only one statutory test of loyalty: Does one "support and defend the Constitution of the United States against all enemies, foreign and domestic"? This is the oath prescribed by statute (5 U. S. C., § 16). This is the oath taken by the plaintiff; he has never been charged with failing to live up to that oath. Of course,

one who does not support this nation against an enemy is disloyal and ineligible for Federal employment. But the Commission and the District Court have attempted to consider the plaintiff disloyal, not because of his attitude towards the nation's enemies, but rather because of his judgment as to the significance to us of the belligerency of a friendly nation which later became a powerful ally. Such a concept interferes with political freedom and violates the political rights of Federal employees protected by the statutes.

Under judicial standards, too, views on foreign affairs may be held in broad latitude with no imputation of disloyalty. In *Schneiderman v. United States*, supra, p. 26, the Supreme Court brushed away doubts as to the loyalty of an individual charged with views which the Commission has not attributed to the plaintiff here, but to which disloyalty has often been imputed. The basis for the Court's ruling was the very fact that such attacks were politically subjective in character. If they were permitted to prevail almost any view on international affairs could be exposed to a similar charge and would result in an "invidious . . . distinction" based upon "the fact that . . . (a court) might agree with or tolerate . . . (one view) but dislike or disagree with . . . (another view)." Ibid.

A departure from these broad standards of loyalty can hardly be justified in the present case, as seems suggested in the District Court's opinion, by the use of the term "reasonable doubt" in the War Service Regulations. That phrase, even if assumed to be valid, permitted a degree of flexibility where lack of loyalty—using the word in the proper legal sense we have here demonstrated—could not be completely established as a matter of *fact*. And we have not denied the scope of administrative discretion in findings on such facts where loyalty is not administratively distorted from its proper meaning. But the language "reasonable doubt" cannot justify a departure from recognized standards of loyalty and the construction of a wholly improper political test of loyalty.

Essentially this same point was involved in the case of *Esquire, Inc. v. Walker*, 80 App. D. C. , 151 F. 2d 49 (1945), affirmed U. S. , 66 S. Ct. 456 (1946). In that case the Post Office Department was told by this Court that it could not use its power to deny the second class mailing privilege to obscene literature in order "to compel the acceptance of its literary or moral standards". 80 App. D. C. at , 151 F. 2d at 52. It was argued that because of the broad administrative discretion vested in the Postmaster General with regard to obscene literature, the judicial function was limited to a determination whether there was any evidence to support the action of the Postmaster. This Court, rejecting the contention, pointed out that it was based upon the fallacy that "the power claimed by the Post Office (to impose literary and artistic standards) is assumed to exist". 80 App. D. C. at , 151 F. 2d at 54.

So here the power to disqualify disloyal persons from Federal employment can hardly be converted into a power to compel Federal employees to accept the political views of the members of the Commission. If the plaintiff does, as is undisputed, "support and defend the Constitution of the United States against all enemies, foreign and domestic" (5 U. S. C. § 16), it is not for the Civil Service Commissioners to weave complex theories that a certain set of political views, commonly held, add up to another form of administrative disloyalty. No language of "administrative discretion" or "reasonable doubt" gives the power to depart from the test of loyalty established by law.

E. The presence of alleged Communist sympathizers in the American Peace Mobilization does not justify plaintiff's dismissal.

The Commission in its letter to the plaintiff, *supra*, pp. 3-4, and the Court below (App. 69) suggested that "people who . . . had shown sympathy with the Communist cause" were active in the American Peace Mobilization. We consider this point entirely irrelevant.

The plaintiff has never been charged with being a member of the Communist Party. And if the Government argues

that the Communist Party advocates the overthrow of the Government by force and violence, as it did in the Court below, then we point out that, aside from the dubious validity of the Government's contention,¹⁹ there is specific and undisputed evidence in this record that the plaintiff did not advocate the overthrow of the Government of the United States. Plaintiff's verified complaint states (App. 13) with no contradiction by the Government:

"The plaintiff has not violated any of the provisions of the Hatch Act and is not charged with any such violation. Plaintiff's continued employment by the War Manpower Commission would not be in contravention of the provisions of any appropriation act of Congress and no such contravention is charged."

The Hatch Act and the appropriations acts specifically prohibit the employment of persons advocating the overthrow of the Government. The Government has not sought to controvert plaintiff's allegation that he does not advocate the overthrow of the Government.

Since, then, there is no charge that the plaintiff is a member of the Communist Party, and there is clear proof that he did not advocate the overthrow of the Government, the charges of both the Commission and the Court are an extreme example of guilt by imputation.

In *Schneiderman v. United States*, 320 U. S. at 136, 63 S. Ct. at 1342, the Court pointed out that

" * * * under our traditions beliefs are personal and not a matter of mere association * * *."

In this case plaintiff takes full responsibility for the views he expressed and the program of the American Peace Mobilization, an entirely lawful organization, in that it embodied his views. He cannot have attributed to him all the opinions of other members active in the organization who may have been sympathetic to the Communist cause.

¹⁹ See *Schneiderman v. United States*, supra, and *Strecker v. Kessler*, 95 Fed. (2d) 976, 96 Fed. (2d) 1020 (C. C. A. 5th, 1938), aff'd on other grounds, 307 U. S. 22, 59 S. Ct. 694 (1939).

Any contrary position would mean that Government employees joining any organization would necessarily be considered as having the views of any other member thereof, whether or not the organization itself expressed those views. The Supreme Court of the United States has, however, pointed out specifically, in a case involving cooperation with Communists, that

“Individuals, like nations, may cooperate in a common cause over a period of months or years though their ultimate aims do not coincide. Alliances for limited objectives are well known. Certainly those who joined forces with Russia to defeat the Nazis may not be said to have made an alliance to spread the cause of Communism. An individual who makes contributions to feed hungry men does not become ‘affiliated’ with the Communist cause because those men are Communists.” *Bridges v. Wixon*, 326 U. S. 135 at 143, 65 S. Ct. 1443 at 1447 (1945).

In the face of the clear record as to the plaintiff in this case, and the undisputed absence of advocacy on his part of the overthrow of the Government, any charge based upon views imputed to others who may have been members of the American Peace Mobilization is groundless.

* * * * *

It is evident from the foregoing that the accusation against the plaintiff was based solely on a political test devised by the Civil Service Commission and affirmed in somewhat altered form by the Court below. Both tests are repugnant to statutory and judicial standards of loyalty, and in their adoption plaintiff's right under the statutes and rule to free political expression was violated.

POINT III

The plaintiff's dismissal was in violation of the First and Fifth Amendments to the Constitution of the United States.

The protection of the right of Federal employees to hold political opinions and to become members of organizations expressing their views, contained in the Civil Service Act and Rules and in the Hatch Act, is also found in the First and Fifth Amendments to the Constitution of the United States. On those constitutional provisions are based the fundamental guarantees of the political freedom of American citizens. These guarantees are applicable to Federal employees in the same manner as they apply to other citizens.

"There is some modicum of freedom of thought, speech, and assembly which all citizens of the Republic may exercise throughout its length and breadth, which no State, nor all together, nor the Nation itself, can prohibit, restrain or impede." *Thomas v. Collins*, 323 U. S. at 540, 65 S. Ct. 315, at 328.

Federal employees, as citizens of the republic, are included within the broad protection of the Constitution, and their constitutional rights are not to be whittled away by an assertion of alleged administrative discretion.

A. The Government as employer enjoys no absolute power.

It has long been recognized that the Government in employing its personnel is not in the same position as a private employer who may generally enjoy unlimited and arbitrary power to confer or withhold employment because of an employee's political views. In administering the machinery of government the executive agencies must, of course, enjoy a wide discretion. However, this necessary latitude which is entrusted to the appointed officers of the

Government does not at all imply that participation in the affairs of the Government, whether as an employee or as a citizen, becomes a privilege resting in the hands of those officers who may be administering the mechanism of government at a particular time.

In *People v. Crane*, 214 N. Y. 154, 108 N. E. 427 (aff'd 239 U. S. 195, 36 S. Ct. 85, 1915), Justice Cardozo stated:

"In thus holding that the power exists to exclude aliens from employment on the public works, we do not, however, commit ourselves to the view that the power exists to make arbitrary distinctions between citizens. We do not hold that the government may create a privileged caste among the members of the state (*Smith v. Texas*, 233 U. S. 630, 638). We do not hold it may discriminate among its citizens on the ground of faith or color (*Strauder v. West Virginia*, 100 U. S. 303; *Gibson v. Mississippi*, 162 U. S. 565; *Rogers v. Ala.*, 192 U. S. 226, 231).

"A citizen may not be disqualified because of faith or color from service as a juror (*Strauder v. West Virginia*, supra). For like reasons we assume that he may not be disqualified because of faith or color from serving the state in public office or employment. It is true, that the individual, though a citizen, has no legal right in any particular instance to be selected as contractor by the government. It does not follow, however, that he may be declared *disqualified from service, unless the proscription bears some relation to the advancement of the public welfare* (*Strauder v. West Virginia*, supra, at p. 305)" (214 N. Y. 154 at 167-168).

Thus it would be patently unconstitutional if the Civil Service Commission or Congress were to exclude by rule or regulation Catholics or Jews from Federal employment, or to discharge them because of their faith. The same considerations hold for Republicans and Democrats, as well as for persons who in 1941 had a different view of the international situation than was held by a few officials of the Civil Service Commission.

B. The Government in granting or withholding privileges is limited by the Constitution and cannot expand its authority by unlawful conditions.

It has been asserted that employment with the Government is a privilege. Therefore, it has been argued that even if the constitutional restrictions above described are applicable the Government may nevertheless attach any condition it pleases to the grant of such a privilege. But this conclusion does not at all follow. For the Government may certainly not impose a condition which is not necessitated by proper performance of official duties and which deprives an employee of his constitutional rights.

Such an absolute privilege theory has been clearly and decisively rejected by the courts. Thus, in *Hannegan v. Esquire* (U. S. , 66 S. Ct. 456) one of the questions discussed was the power of the Postmaster General to withhold second-class mailing privileges from a publication by asserting that it was obscene. Mr. Justice Douglas said (66 S. Ct. at 461):

“ * * * grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. See the dissents of Mr. Justice Brandeis and Mr. Justice Holmes in *U. S. ex rel. Milwaukee S. D. Pub. Co. v. Burleson*, 255 U. S. 407, 421-423, 430-432, 437, 438. Under that view the second-class rate could be granted on condition that certain economic or political ideas could not be disseminated.”²⁰

Significantly, the Supreme Court considered the *Esquire* case as raising not only the question of regulation of artistic taste but especially the issue of suppression of thought of all types. The Court held that the position urged by the Postmaster General would give him a “power of censorship * * * abhorrent to our traditions” (66 S. Ct. at 459), and the second-class postal rate “could be granted

²⁰ See also the opinion by Chief Justice Groner in *Pike v. Walker*, 73 App. D. C. 289, 121 F. (2d) 37 (1941).

on condition that certain *economic or political* ideas be not disseminated * * * " (at 461).

" * * * to withdraw the second-class rate from this publication today because its contents seemed to one official not good for the public would sanction withdrawal of the second-class rate tomorrow from another periodical whose *social or economic* views seemed harmful to another official" (66 S. Ct. at 462).

The censorship of political opinions by a Government officer through the method of withholding an official privilege, which the Supreme Court feared to be the implication of the Postmaster's attitude in the *Esquire* case, is precisely what the Civil Service Commission has sought to achieve in this case, and precisely what it constitutionally may not do.

Nor indeed does the proposition that the Government may impose any condition it pleases to Government employment, even the surrender of rights enjoying constitutional protection, find support in the frequently repeated but rarely analyzed remark of Mr. Justice Holmes (then Chief Justice of the Massachusetts Supreme Court) in the case of *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N. E. 517, that "the petitioner may have a constitutional right to talk politics but he has no constitutional right to be a policeman". For the ordinance involved in that case provided that: "No member of the department shall be allowed to solicit money or any aid, on any pretense, for any political purpose whatever." Mr. Justice Holmes made it clear, as the full context of the extracted sentence reveals, that the Government is limited to imposing reasonable conditions to Government employment, and that in his opinion the particular restriction was a reasonable one. Thus the entire statement is:

"The petitioner may have a constitutional right to talk politics, but has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness,

by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control. This condition seems to us reasonable, if that be a question open to revision here."

The above ordinance was limited to policemen, officers who concededly may enjoy extensive official authority over members of the public and might very well be in a position to exercise improper pressure in their fund-collecting activities. The plaintiff is hardly in such a position. Moreover, what is involved with respect to the plaintiff is not a matter of collecting funds (a practice frequently subject to Government regulation), but rather a general prohibition as to his political thought. Justice Holmes' belief that the New Bedford ordinance was reasonable would hardly extend to the Commission's action in this case.

That Mr. Justice Holmes recognized that the Federal Government could not constitutionally curtail all rights of Government workers to engage in political activity is evident from his opinion in *U. S. v. Thayer*, 209 U. S. 39. That case involved a conviction under the statute prohibiting solicitation of Government workers for political purposes on Government property. The conviction of the defendant, who had written a letter soliciting funds for political purposes to a Government worker, addressed to him at his office, was upheld under the statute. In commenting upon the purpose and scope of the statute, Mr. Justice Holmes stated, 209 U. S. at 42-43, 28 S. Ct. at 427 (1908):

"The purpose is wider than that of a notice forbidding book peddling in a building. It is not, even primarily, to save employees from interruption or annoyance in their business. It is to check a political abuse which is not different in kind, whether practiced by letter or word of mouth. The limits of the act, presumably, were due to what was considered the reasonable and possibly the *constitutional freedom of citizens, whether officeholders or not*, when in private life,

and it may be conjectured that it was upon this ground that an amendment of broader scope was rejected."

The reasons advanced for the discrimination exercised against plaintiff could not justify discriminatory action by a Government agency against a citizen not a Government employee. Such a citizen could not be fined or imprisoned for holding the views and maintaining the affiliation of the plaintiff's, nor could his tax liability and his eligibility for Social Security benefits, veteran's benefits, farm loans or mortgage guarantees be affected thereby. He could not be denied the use of the mails even to disseminate the very views which formed the basis for the Civil Service Commission's action here. Any such discrimination would contravene the rights secured him by the Constitution. Since the regulation of Government employees, as we have seen, gives no basis for the regulation of political views and affiliations, the Government acquires no power to discriminate against the holder of such views and affiliations because it chooses to select one sanction rather than another, or to utilize as a sanction dismissal from Government service and the denial of Government employment. The Government agencies, including the Civil Service Commission, have no additional powers to prohibit the holding of such views and affiliation of a citizen because of his status as a Government employee.

CONCLUSION

Critical periods in American history, such as wars and their aftermaths, have repeatedly heightened the sense of loyalty and patriotism of the American people. In times of stress the citizen realizes, more keenly than usual, perhaps, the personal and immediate importance of his national traditions and institutions. Occasionally, however, these wholesome emotions, by design or through misguided zeal, have been perverted, and have been utilized to justify excesses which in more stable times would be universally condemned.

Officialdom, too, has not always risen above the baser displays of an exaggerated affectation of patriotism. In such cases the forceful reminders of the need for dispassionate tolerance have come from the judiciary. Cognizant no less than other Government officers of the national welfare and security, and sufficiently set apart from the immediate issue to view it detachedly, the courts have exercised the unique function of shielding the victims of unconstitutional legislative and executive excesses. For example: *Cummings v. Missouri*, 4 Wall. 277, 18 S. Ct. 356 (1867); *Ex parte Garland*, 4 Wall. 333, 18 S. Ct. 366 (1867); *Berger v. U. S.*, 255 U. S. 22, 41 S. Ct. 230 (1921); *Colyer v. Skeffington*, 265 Fed. 17 (D. Mass. 1920), reversed as to some of the petitioners, 277 Fed. 129 (C. C. A. 1, 1922); *U. S. v. Lovett et al.*, U. S. , 66 S. Ct. 1073 (1946).

Thus, violations of legal rights and individual liberties arising out of the passions of the Civil War, World War I and World War II met with judicial remonstrance. The Civil Service Commission's unlawful action in the present case was a product of its strong political feeling during the last war. Its action should be set aside and the judgment of the Court below should be reversed.

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BRIEF FOR APPELLEES

United States Court of Appeals

DISTRICT OF COLUMBIA

478

No. 9305

MORTON FRIEDMAN, APPELLANT

v.

LEWIS B. SCHWELLENBACH ET AL., APPELLEES

APPEAL FROM ORDER OF THE DISTRICT COURT FOR THE DISTRICT
OF COLUMBIA

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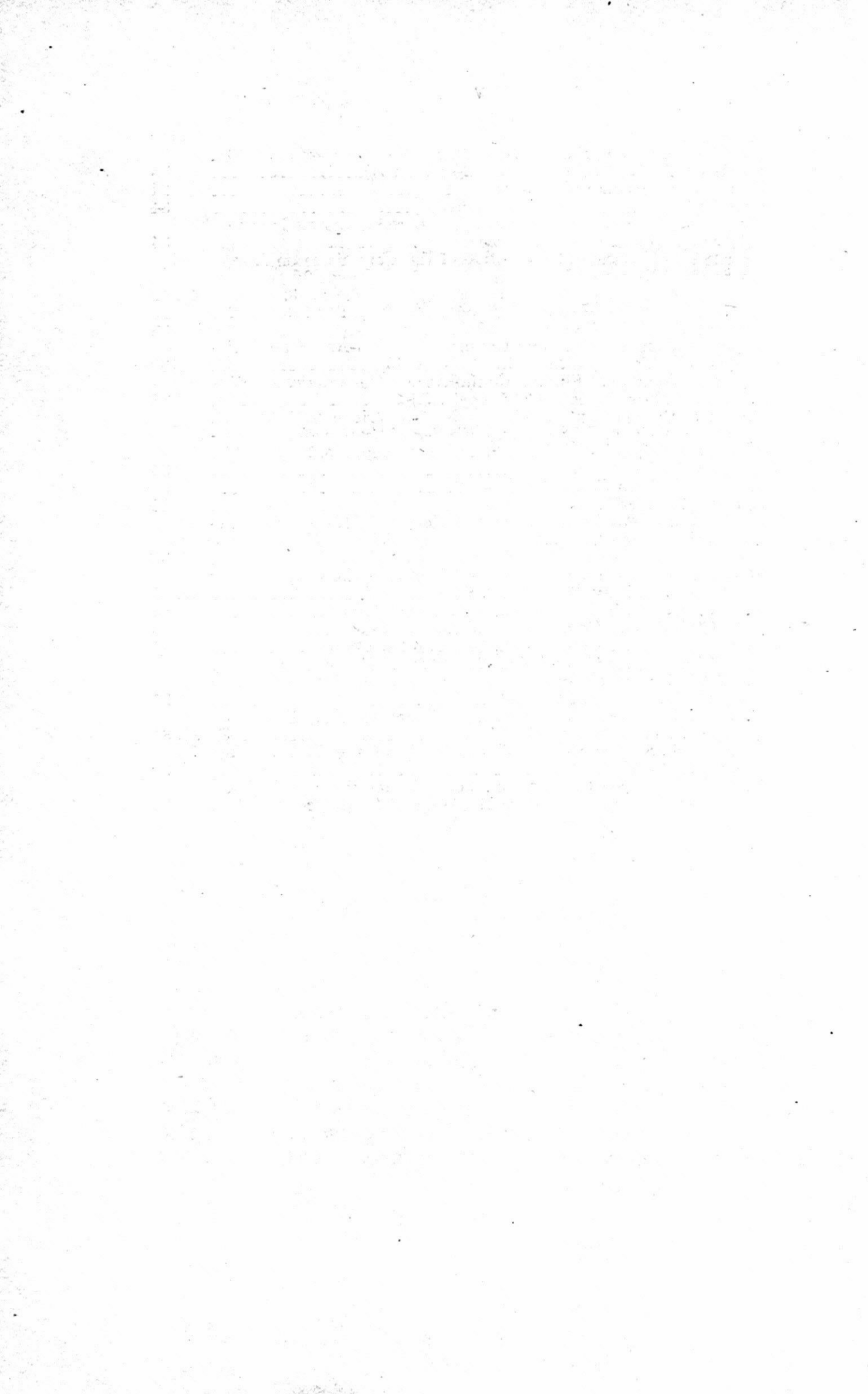
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United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9305

MORTON FRIEDMAN, APPELLANT

v.

LEWIS B. SCHWELLENBACH, INDIVIDUALLY AND AS SECRETARY OF LABOR, HARRY B. MITCHELL, LUCILLE FOSTER McMILLIN AND ARTHUR S. FLEMMING, INDIVIDUALLY AND AS MEMBERS OF THE CIVIL SERVICE COMMISSION, APPELLEES

COUNTERSTATEMENT OF THE CASE

This was an action for declaratory judgment, mandamus, and injunction. Originally named as defendants were Paul V. McNutt, individually and as Chairman of the War Manpower Commission, and Harry B. Mitchell, Lucille Foster McMillin, and Arthur S. Flemming, individually and as members of the United States Civil Service Commission. Because of the resignation of Mr. McNutt as Chairman of the War Manpower Commission and the transfer on September 17, 1945, pursuant to Executive Order No. 9617 (10 F. R. 11929), of that wartime agency and all of its functions, employees, and records, with certain exceptions not here material, to the Department of Labor, Lewis B. Schwellenbach, individually and as Secretary of Labor, was substituted as a party defendant.

In their answer to plaintiff's complaint defendants denied certain of the allegations of said complaint, raised an affirmative defense, and renewed the objection previously made (App. 20) that the complaint failed to state a claim upon which relief could be granted. With the case thus at issue, plaintiff filed a motion for summary judgment. Defendants thereupon also moved for summary judgment in their favor. The Court below

denied plaintiff's motion and granted that of defendants (App. 62, 71, 72).

* * * * *

There is no factual dispute. The facts, as found by Justice Bailey (App. 62-69), are:

On February 16, 1942, the President, by virtue of the authority vested in him by Section 2 of the Civil Service Act, issued Executive Order No. 9063 (7 F. R. 1075) authorizing the Civil Service Commission to adopt and prescribe such special procedures and regulations relating to the recruitment, placement, and changes in status of personnel in Federal service as it determined to be necessary in order that there would be no delay during the war emergency in filling positions in the Federal service with qualified persons. Said Executive Order further provided that the procedures and regulations thus adopted and prescribed were to be binding with respect to all positions affected thereby which were subject to the provisions of the Civil Service Act and rules. The second paragraph of Executive Order No. 9063 stated that persons appointed solely by reason of any special procedures adopted under authority of said order to positions subject to the provisions of the Civil Service Act and rules were not thereby to acquire a classified (competitive) civil-service status, but, in the discretion of the Civil Service Commission, might be retained for the duration of the war and for 6 months thereafter.

The President on February 20, 1942, by Executive Order No. 9067 (7 F. R. 1407) further authorized the Civil Service Commission to secure information as to employees of executive departments and agencies who were deemed competent to perform essential war work in departments or agencies having a higher priority classification, and, with the consent of the employees concerned, to effect the transfer of any such employee to meet the personnel needs of a department or agency, having a higher priority classification, and to adopt such rules and regulations and to establish such procedures as might be necessary to carry out its responsibilities thereunder. This Executive order remained in effect until September 27, 1942 (Executive Order No. 9243, September 12, 1942).

Pursuant to Executive Orders 9063 and 9067, the Civil Service Commission prepared and adopted the War Service Regulations, effective March 16, 1942 (Title 5, CFR, Cum. Supp., Chapter I, Part 18; 7 F. R. 7723).

In order to expedite employment and transfers to meet war conditions, the Civil Service Commission, pursuant to the aforesaid Executive Orders, expanded its use of conditional appoint-

ments and conditional transfers, a practice whereby the Commission effects an immediate employment or transfer, subject to a condition.¹ The condition ordinarily imposed is that the person shall be subject to a character investigation for the purposes of ascertaining the qualifications determinable by such investigation. This procedure enables the Commission to fill a vacancy immediately and complete its examination of the applicant or transferee at a subsequent date. Prior to the war, the Commission's policy was to publish an announcement of the examination, stating the type of position, required qualifications, place of examination, etc., hold an examination, establish a register and certify three names from the top of the register to the agency subject to a character investigation.² To meet the necessity of rapid expansion of employment, the Commission, under the authority of Executive Order No. 9063, dispensed with this peacetime practice and resorted to the speedier methods of recruitment. Persons were placed on the job under a conditional appointment or conditional transfer, and thereafter, the Commission conducted its investigation to ascertain certain factors of qualification before certifying as to the eligibility of the applicant or transferee.

Appellant was transferred on May 29, 1942, from the Federal Works Agency to the Division of Central Administrative Services, Office for Emergency Management. This transfer was expressly made "subject to character investigation" (App. 47, 53). Without change in status appellant, while said investigation was being conducted and while certain of the events hereinafter described were taking place, was involved first in an interoffice transfer (September 16, 1942) to the War Manpower Commission, Personnel Branch, Central Administrative Services, Office for Emergency Management, and later (March 27, 1943) in a group transfer shifting all personnel functions of the Office for Emergency Management to the constituent agencies of the Office for Emergency Management, in appellant's case the War Manpower Commission.

Until appellant's conditional transfer, effective May 29, 1942, to the Office for Emergency Management, his previous em-

¹ The conditional appointment method has been in use since 1934. App. 47, 52. During the fiscal years 1941, 1942, 1943 and the first 5 months of the fiscal year 1944 the Civil Service Commission investigated 125,612 persons under its regular investigative program. Approximately 96 percent of the investigations were made after the person entered on duty. *Hearings Before the Subcommittee of The Committee on Appropriations, House of Representatives, 78th Cong., 2d Sess., on the Independent Offices Appropriation Bill for 1945*, pp. 1066-1067.

² See, United States Civil Service Commission, *Civil Service Act, Rules and Regulations Annotated* (1943), p. 255; Executive Order No. 8423, May 28, 1940.

ployment with the Federal Government had at all times been in positions excepted from the classified civil service (Act of November 26, 1940, Section 1, 54 Stat. 1211; 5 U. S. C. 631 (a)). Said conditional transfer brought appellant for the first time within the scope of the War Service Regulations and the Civil Service Rules, and within the jurisdiction of the Civil Service Commission. He was at no time in the Federal classified civil service.

War Service Regulation II, Section 3 provides as follows:

An applicant may be denied examination and an eligible may be denied appointment for any one of the following reasons:

* * * * *

(g) *a reasonable doubt as to his loyalty to the Government of the United States;*

Any of the reasons stated in the foregoing subdivisions from (b) through (h) inclusive, shall be sufficient cause for removal from the service.

This disqualification, like the others provided in War Service Regulation II, is an element that comes within the scope of an investigation and which usually is only discovered by investigation.

The Commission's established procedure and practice, which were followed in appellant's case, where a question of qualification to be determined by investigation is involved, is as follows:

1. From the reports of investigation and other pertinent data pertaining to the case, a recommendation as to eligibility is made by a rating board to the Commission, which makes a decision as to the qualification of the applicant or transferee, finding him eligible or ineligible for Federal employment.

2. If the decision is that the application is ineligible, the applicant may enter an appeal to the Board of Appeals and Review of the Commission, within thirty days from the notification of such decision.

3. If the decision is appealed, the entire record is referred to the Board of Appeals and Review of the Commission before whom the applicant may appear in person with witnesses and counsel of his own choosing.³ A stenographic report is made of the hearing,

³ See, United States Civil Service Commission, *Civil Service Act, Rules and Regulations Annotated* (1943), pp. 66-68.

after which the Board of Appeals and Review considers the matter *de novo* and makes a recommendation to the Commission. The Commission again considers the entire record, including the evidence produced at the hearing before the Board of Appeals and Review, and makes its decision based upon the entire record.

4. If the decision of the Commission after a hearing before the Board of Appeals and Review is adverse to the applicant, he may appeal to the Commission for a hearing before the Commissioners personally, after which the Commission makes its final determination of the matter.

Pursuant to the condition set forth in the transfer of appellant on May 29, 1942, from the Federal Works Agency to the Division of Central Administrative Services, Office for Emergency Management, whereby the transfer and appellant's tenure were made subject to a character investigation, the Commission conducted an investigation as to appellant's qualifications, suitability, and fitness. As a result of that investigation, the Commission determined that there was a reasonable doubt as to appellant's loyalty to the Government of the United States and that appellant was therefore not eligible for Federal employment in a War Service status and, under date of October 27, 1942, requested Central Administrative Services, Office for Emergency Management, to terminate his services (App. 50, 54). Appellant appealed from this decision and a hearing was held on January 26, 1943, before the Board of Appeals and Review of the Commission. At said hearing appellant was given full opportunity to present for consideration all the evidence and testimony he desired on the question of his eligibility for a War Service appointment (App. 37-39). Thereafter, the Commission, upon review and reconsideration of the entire record reaffirmed its determination that appellant was ineligible for Federal employment and by letter of May 3, 1943, so notified him (App. 50, 55). The Office of Emergency Management was also notified on May 3, 1943, that the Commission's previous action had been affirmed (App. 50, 56).

The Office for Emergency Management, War Manpower Commission, by letter dated May 17, 1943, requested additional time within which to review the matter to consider the possibility of a direct appeal to the Civil Service Commission (App. 50, 57). On October 13, 1943, the War Manpower Commission requested the Civil Service Commission to reconsider the

matter. This the Commission did. Following reconsideration, the Civil Service Commission advised the War Manpower Commission by letter dated February 25, 1944, that it had again affirmed its original action (App. 51, 58). On March 23, 1944, the Office for Emergency Management, War Manpower Commission, notified the United States Civil Service Commission that appellant had requested a personal appearance before the Commissioners (App. 51, 59), and that pending said personal appearance action looking toward his separation was being held in abeyance. The Civil Service Commission, in accordance with its usual policy, did not object to appellant's continued employment pending his appeal to the Board of Appeals and Review and the Civil Service Commission. This request for a personal appearance before the Commission was granted and a hearing was held before the Commissioners on April 19, 1944. On June 5, 1944, the Commission, after consideration of the complete record, including the matters presented at the hearing held before them on April 19, 1944, reaffirmed its decision and so notified appellant by letter on June 5, 1944 (App. 7). Said letter of June 5, 1944, set forth some of the principal factors which led the Civil Service Commission to conclude that there was a reasonable doubt as to appellant's loyalty, but said letter did not constitute, nor purport to constitute, a full statement of the specific reasons for the determination by the Civil Service Commission as to appellant's ineligibility, said determination being based upon the complete investigation made, including confidential reports of the Federal Bureau of Investigation.

The War Manpower Commission was similarly notified by letter dated June 5, 1944, of the determination of the Civil Service Commission that appellant had been found ineligible, and the Civil Service Commission renewed its request that appellant's services be terminated by the War Manpower Commission. The War Manpower Commission advised that appellant's employment would be terminated as of July 10, 1944 plus accumulated annual leave (App. 52, 60). Accordingly, appellant's employment was terminated September 12, 1944 (App. 2).

Under date of August 16, 1944, the Civil Service Commission advised appellant that any and all applications and eligibilities of appellant for examinations were cancelled* because information disclosed through investigation indicated that appellant

* See, United States Civil Service Commission, *Civil Service Act, Rules and Regulations Annotated* (1943), p. 68.

did not measure up to the required standard of suitability and fitness (App. 52-61). The records of the Civil Service Commission do not disclose that appellant had any applications or eligibilities for examination then pending (App. 52).

The position held by appellant during the period April 18, 1943, to September 12, 1944, was that of Chief of the Classification Division of the War Manpower Commission. In said position he was responsible for assuring that the classifications of some 3,000 employees of the War Manpower Commission were properly allocated under the Classification Act of 1923 and amendments thereto, and that the classifications of an additional group of employees of the War Manpower Commission, numbering approximately 20,000, were properly allocated under the relevant salary classification acts of each of the States in which offices of the War Manpower Commission were located. In the performance of his duties, plaintiff had the assistance of as many as 11 technical analysts subordinate to him, and a clerical staff (Plaintiff's Affidavit, paragraph 9). From March 29, 1942, to April 17, 1943, plaintiff held the posts of Principal Position Classification Analyst and Head Position Classification Analyst (Plaintiff's Affidavit, paragraph 7). Plaintiff's employment was thus closely related to the efficient operation of an agency having important duties and heavy responsibilities in mobilizing the Nation's war effort.

THE QUESTIONS PRESENTED

This case represents the first attack upon any action taken pursuant to the War Service Regulations which, during the war, have governed the employment by the United States of hundreds of thousands of persons, their transfer and removal. More particularly, it is an attack upon a vital part of the war-time functions of the United States Civil Service Commission under these regulations—the determination, in deciding every applicant's eligibility, fitness, and suitability for a War Service appointment, whether there is any reasonable doubt as to the applicant's loyalty to the Government of the United States. For failure, in the Commission's judgment, to satisfy this requirement hundreds of persons in the past 5 years have been disqualified for Federal employment.⁵ The action of the Civil

⁵ From July 1, 1940, to November 23, 1943, 981 persons were found to be unsuitable for Government employment solely on loyalty grounds. *Hearings Before the Subcommittee of the Committee on Appropriations, House of Representatives, 78th Cong., 2d Sess., on the Independent Offices Appropriation Bill for 1945*, pp. 1039-1040.

Service Commission in determining, after thorough investigation, that there was a reasonable doubt as to appellant's loyalty and that therefore he was not qualified under the controlling regulations to obtain a War Service appointment, is asserted to be unlawful as in violation of the Civil Service Act, Civil Service Rule I, Sec. 2, and Sec. 9 (a) of the Hatch Political Activities Act. It is also argued that such determination by the Commission abridges appellant's fundamental rights guaranteed by the First and Fifth Amendments to the Constitution.⁶ These assertions cannot be sustained. The Commission's action was in all respects in complete conformity with law. There has been no unlawful infringement of plaintiff's constitutional liberties.

In every case, but especially in one such as this which ranges over a variety of interrelated material and deals with the asserted violation of both constitutional and statutory guarantees, it is important to reach the precise questions presented. One path to that end is to note what is not involved:

1. This is not a case of removal after an absolute appointment. Appellant's employment was terminated because he was found ineligible or not qualified to receive a War Service appointment.

2. This is not a case in which appellant has been determined to be disloyal. The Commission's determination was only that there was a reasonable doubt as to appellant's loyalty to the Government of the United States. This is all that is required by the controlling regulations.

3. This case does not involve any issue of personal prejudice, discrimination, or unequal treatment. It is not claimed, nor could it be, that appellant was treated in any way different from all others similarly situated.

4. It is not claimed that the Commission's determination was based upon inadequate or incomplete investigation.

5. The Commission's determination does not bar plaintiff from all Federal employment. The Civil Service Commission exercises jurisdiction over the Executive Branch of the Federal Government, and, within the Executive Branch, only over classified and War Service appointments. Nor does the Commission's finding constitute an absolute bar to appellant's employment even in the Executive Branch of the Federal Gov-

⁶The further contention was made below that the termination of appellant's employment by the War Manpower Commission as a result of the Commission's finding of ineligibility was in violation of Section 6 of the Lloyd-LaFollette Act (App. 14, 40). This contention has now been abandoned. Appellant thus concedes the inapplicability of that statute.

ernment to a position over which the Civil Service Commission has jurisdiction. Appellant is free to apply for any such position for which he considers himself qualified and his application would receive the same consideration as all others submitted. The issue of loyalty would again be reviewed and appellant would be free to present such further evidence as he may have upon that question.

6. No issue is raised as to the basic validity or regularity of the War Service Regulations. Moreover, appellant conceded below that the loyalty standard prescribed by the War Service Regulations is proper and fully within the Government's power, saying in his memorandum in support of his motion for summary judgment (p. 26), "The right to disqualify Federal employees because of reasonable doubts as to their loyalty would seem obvious enough in time of war" (App. 69).

7. This case does not involve the disqualification of a Federal employee on loyalty grounds in time of peace.

8. This case does not involve Government public regulation. It concerns solely internal regulation of the Government's own affairs. It deals only with the Government's own personnel policies.

With this enumeration of what is here not involved the questions actually presented are brought into sharper focus.

Two principal questions are presented for decision:

1. To what extent will the Courts review actions or determinations of the Executive relating to the appointment or removal of employees in the Executive Branch of the Federal Government?

2. To the extent such actions or determinations of the Executive affecting its personnel are judicially reviewable, was appellant's disqualification for a War Service appointment on the ground that the Civil Service Commission, after investigation, found there was a reasonable doubt as to appellant's loyalty to the Government of the United States, violative of the Constitution, or illegal as contrary to any controlling statute, rule, or regulation?

STATUTES, EXECUTIVE ORDERS, RULES, AND REGULATIONS INVOLVED

The pertinent provisions of additional statutes, executive orders, rules, and regulations involved are set forth in Appendix A annexed hereto.

SUMMARY OF ARGUMENT

- I. It is firmly established that the Courts will not retry the facts or reexamine the merits of internal administrative decisions of the Executive such as that involved in the case at bar. Judicial inquiry will, at most, extend only to a determination of whether the action taken was in clear violation of the Constitution or any controlling statute, rule, or regulation**

Under the fixed rule, established by a host of decisions from which there has been no deviation, the Courts will not intervene in or interfere with the internal operations and functions of the Executive Branch of the Federal Government—they will not review or retry the detailed facts underlying the exercise of executive judgment and discretion in such matters. This rule has had perhaps its most frequent application in cases involving Executive personnel administration. Courts will, in such cases, look only to see whether the Executive had the legal authority to make the determination complained of and whether the statutory procedure prescribed, if any, was followed. Here the legal right, even duty, of the Executive to inquire into and make determinations concerning loyalty, especially in time of war, would seem self-evident and was conceded by appellant below (App. 69). Appellant here has abandoned any contention that he was deprived of any procedural guaranty in connection with his disqualification and the subsequent termination of his employment.

- II. Examination by the Civil Service Commission of appellant's political expressions, actions, and affiliations in order to determine whether a reasonable doubt existed as to his loyalty to the Government of the United States was both necessary and proper, and not in contravention of the Constitution or any controlling statute, rule, or regulation**

The right of the Government to inquire into the loyalty of those seeking Federal employment has meaning only if the statements and acts of all applicants may be examined, because loyalty, as the courts have recognized, is a matter of the "heart and mind." In no other way, except by probing opinions, conduct, and affiliations, can doubts as to loyalty reasonably be resolved.

A. No constitutional rights of appellant have been abridged

The absence of any constitutional issue whatever is strongly indicated by the fact that for more than a century prior to the passage of the Civil Service Act in 1883, practically all Federal employees were appointed and removed solely on the basis of their political opinions, conduct, and affiliations, without any suggestion that such exercise of the executive power in any way constituted an infringement of fundamental rights. Even today, many offices and positions in the Federal service not covered by the Civil Service Act are filled and held entirely on the basis of political affiliation and activity.

Freedom of speech is not unconstitutionally restricted by an examination—as is so frequently done in all types of judicial proceedings—of a person's past acts or statements in order to establish his attitude or state of mind. Nor can it be contended that the Fifth Amendment has been violated in view of the settled principles that appellant could have no "property" in his Federal employment and that a hearing such as was accorded appellant at which all he desired to say or offer was heard and received satisfies all the requirements of procedural due process.

The constitutional validity of the Commission's action is buttressed by the far-reaching war powers of the Federal Government and by the broad authority of the Government in its capacity as employer. Many decisions establish the Government's wide latitude and discretion under the Constitution in the selection of personnel for public work and in prescribing conditions and regulations governing their appointment and retention.

B. No statute, controlling rule, or regulation has been violated

The provisions of the Civil Service Act referred to by appellant have no relation to the case at bar for they deal with prohibitions upon compulsory contributions to political funds and the use of official influence to coerce political action, matters not here involved. Nothing in its terms or history suggests any restriction upon such inquiry as was conducted by the Commission. Rather, the War Service Regulations, pursuant to which such investigations are made, were promulgated pursuant to Executive Order No. 9063 issued under the authority vested in the President by Section 2 of that Act.

Rule I, Section 2, of the Civil Service Rules is aimed at the "spoils system" and the evils of patronage. It is not concerned with loyalty investigations and places no prohibition upon them. If any conflict exists between this Rule and the War Service Regulations authorizing investigations of loyalty, the latter would prevail by reason of the express provision in Executive Order No. 9063 authorizing the preparation and adoption of the War Service Regulations that "the procedures and regulations thus adopted and prescribed shall be binding with respect to all positions affected thereby which are subject to the provisions of the Civil Service Act and rules."

Section 9 (a) of the Hatch Act was taken almost *verbatim* from Civil Service Rule I, Section 1, which since its promulgation in 1907, was uniformly interpreted as having application only to partisan party politics. This long continued administrative interpretation will ordinarily be adopted in construing the statute. Moreover, this provision of the Hatch Act is framed in terms of *retention*. Federal employees are to "retain" the same right to express their political opinions which they possessed before entering Federal service; they are not to be discriminated against on this ground merely because they are Federal employees. There has been no such discrimination. Appellant has been treated in precisely the same manner as all others seeking a War Service status. Exactly the same investigation and determination would be made, with the same factors being considered, in the case of an applicant with appellant's background who had never before held Federal employment. Appellant has thus retained the same rights with respect to expression of political opinions possessed by citizens not in Federal employ. This is what Section 9 (a) of the Hatch Act guarantees and that guaranty has not been violated.

III. The determination of the Civil Service Commission that there was a reasonable doubt as to appellant's loyalty is conclusive on the facts. In any event, said determination was reasonable and supported by evidence

The general rule is that where a determination has been left to an administrative body, such delegation will be respected and the administrative conclusion left untouched. No provision for judicial review is made in the Civil Service Act.

If, however, despite this principle, and the rule of judicial nonintervention considered in Point I, a review is undertaken of the detailed factual basis of the Civil Service Commission's determination in this case, the result is the same. Appellant admits that he was "prominently and actively affiliated" with American Peace Mobilization, "participated actively in their

meetings and affairs," and was "active in the affairs of the Washington Peace Mobilization and served on several of its committees." The Attorney General has found that American Peace Mobilization (of which the Washington Peace Mobilization was a subsidiary) was a Communist-inspired and Communist "front" organization. In addition, appellant admittedly followed the changes in the foreign policy line of the Communist Party and thus came squarely within the Civil Service Commission's Communist Party Line test of loyalty. It is thus not an unreasonable inference that appellant was at least sympathetic to and an adherent of the program and policies of the Communist Party. The overwhelming weight of authority is that the Communist Party advocates the overthrow of the Government by force.

IV. Under any circumstances appellant is not entitled to the relief requested

Since it is well settled that a court of equity has no jurisdiction over the appointment and removal of public officers, the injunctive relief sought cannot be granted. The mandatory relief requested runs directly counter to the fixed rule that the only acts to which the power of the courts, by mandamus, extends, are such as are purely ministerial and with regard to which no judgment or discretion is left to the officer. This disability is not cured by requesting a declaratory judgment. Furthermore, much of the relief prayed for goes far beyond the issues and limits of the case.

ARGUMENT

POINT I

The judiciary will not intervene in the internal administration of the Executive and will not review or retry the merits of the appointment, removal, transfer, advancement, or demotion of Federal employees, but will at most only determine whether the action taken is clearly violative of the Constitution or any controlling statute, rule, or regulation

Appellant's complaint is directed at the refusal of the Civil Service Commission, after investigation and in the performance of duties expressly committed to its jurisdiction, to find him eligible for a War Service appointment in an executive agency under regulations equally applicable to all applicants for such positions. No question is, or can be, raised as to the validity of the War Service Regulations as a whole nor of that section thereof which lays down the disqualifications based

upon a reasonable doubt as to the loyalty of an applicant to the Government of the United States.

The proceedings of the Civil Service Commission having been regular and pursuant to valid regulation, and appellant admitting, as he must, that the Government obviously has the right in time of war to inquire into the loyalty of applicants for Federal employment and to deny such employment when any reasonable doubt as to such loyalty appears, the question is squarely presented as to what extent, if at all, the Courts will review such internal administrative decisions of the Executive Branch of the Federal Government. If the Courts, as appellees contend is the firmly established rule, and as the Court below held (app. 70-71), will not in cases of this character, retry the facts or reexamine the merits, but will at most look only to see whether the Executive had the legal right to take the action or make the determination in question, the instant case is not one of great difficulty. Appellant has freely admitted that the Government had the right to make the determination which it did. What appellant has sought to do is to draw the Court into a review and reexamination of some of the detailed considerations which led the Civil Service Commission to its conclusion that a reasonable doubt existed as to appellant's loyalty to the Government of the United States. This, as many decisions establish, is precisely what the Courts have consistently refused to do.

Probably few principles of law are more definitely established than that expressing the forbearance of the Courts in matters involving the internal administration of the Executive Branch of the Government. The Courts will not review the acts of executive officials performed within the scope of the executive authority, nor will the courts substitute their judgment for that of the officials. "The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them." Taney, C. J., in *Decatur v. Paulding*, 39 U. S. (14 Pet.) 496, 515 (1840); *Perkins v. Lukens Steel Co.*, 310 U. S. 113, 131-132 (1940).

This principle of nonintervention in the normal functions and duties of the Executive Branch of the Government, has had perhaps its most frequent expression and application in cases, such as the one at bar, involving matters related to executive personnel administration. *Keim v. United States*, 177 U. S. 290 (1900); *Eberlein v. United States*, 257 U. S. 82 (1921), aff'g 53 C. Cls. 466 (1918); *White v. Berry*, 171 U. S. 366 (1898); *Hammond v. Hull*, 131 F. (2d) 23 (App. D. C., 1942),

cert. den. 318 U. S. 777 (1943); *Love v. United States*, 108 F. (2d) 43 (C. C. A. 8th, 1939), cert. den. 309 U. S. 673 (1940); *Levine v. Farley*, 107 F. (2d) 186 (App. D. C., 1939) cert. den. 308 U. S. 622 (1940); *United States ex rel. Taylor v. Taft*, 24 App. D. C. 95 (1904), writ of error dismissed 203 U. S. 461 (1906); *Lellman v. United States*, 37 C. Cls. 128 (1902); *Miller v. United States*, 45 C. Cls. 509 (1910); *Kellom v. United States*, 55 C. Cls. 174 (1920); *Golding v. United States*, 78 C. Cls. 682 (1934); *Bennett v. United States*, 89 C. Cls. 322 (1939); *Bratton v. United States*, 90 C. Cls. 604 (1940); *Block v. Sassaman*, 26 F. Supp. 105 (D. Minn., 1939); *Waterman v. Somervell*, 34 F. Supp. 695 (S. D. N. Y., 1940).

In *Keim v. United States*, *supra*, the plaintiff was discharged as inefficient. The plaintiff requested the Court below to find that his discharge was "without just cause" and that at the time of his discharge he was an efficient clerk who had "discharged his duties faithfully and efficiently" and possessed "the necessary business capacity for the proper discharge of the duties of said clerkship" (p. 292). These findings the Court below declined to make "deeming said requested findings, if true, to be irrelevant to the issue presented" (p. 292). In affirming the dismissal of plaintiff's action the Supreme Court declared in language directly pertinent here (pp. 292, 293-294, 295-296):

Upon these facts we are asked to decide whether the courts may supervise the action of the head of a department in discharging one of the clerks therein.

It has been repeatedly adjudged that the courts have no general supervising power over the proceedings and action of the various administrative departments of government. * * *

The appointment to an official position in the Government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore it is one of those acts over which the courts have no general supervising power. * * *

Nowhere in these statutory provisions is there anything to indicate that the duty of passing, in the first instance, upon the qualifications of the applicants, or, later, upon the competency or efficiency of those who have been tested in the service, was taken away from the administrative officers and transferred to the courts. Indeed, it may well be doubted whether that is a duty

which is strictly judicial in its nature. It would seem strange that one having passed a civil-service examination could challenge the rating made by the commission, and ask the courts to review such rating, thus transferring from the commission, charged with the duty of examination, to the courts a function which is, at least, more administrative than judicial; and if courts should not be called upon to supervise the results of a civil-service examination equally inappropriate would be an investigation into the actual work done by the various clerks, a comparison of one with another as to competency, attention to duty, etc. These are matters peculiarly within the province of those who are in charge of and superintending the departments, and until Congress by some special and direct legislation makes provision to the contrary, we are clear that they must be settled by those administrative officers. [Italics supplied.]

In the *Eberlein* case, *supra*, an employee of the Customs Service of the Treasury Department was removed upon the basis of certain charges preferred against him. Upon subsequent reinvestigation it was reported by the Attorney General and the Supervisor of Customs that the charges had not been sustained, and the President caused Eberlein to be reinstated. After such reinstatement, he brought suit against the United States in the Court of Claims seeking to recover his salary for the time he was out of employment. The Court of Claims, while pointing out in its opinion that the subsequent investigation had established Eberlein's complete innocence, nevertheless denied him any recovery. The Supreme Court, in affirming the decision of the Court of Claims, said (p. 84):

There can be no question from the findings in this case that the plaintiff had the benefit of a hearing according to the regulations then in force. * * * the things required by law and regulations were done, and the discretion of the authorized officers was exercised as required by law. It is settled that in such cases the action of the executive officers is not subject to revision in the courts.

In *Hammond v. Hull*, *supra*, this court applied this principle in a case, similar to the instant case, involving an action against the Secretary of State and other officials for mandatory and injunctive relief and for a judgment declaring plaintiff's rights as a foreign service officer. In accordance with the rule that courts will not review the merits or attempt to determine the

truth or falsity of charges underlying the dismissal, reduction, or other action taken with respect to Federal executive personnel, the Court did not reexamine, as plaintiff there prayed, the charge against him that he had engaged in disloyal dealings with an alleged agent of a foreign government. The Court concerned itself only with determining whether the action of the defendants was "clearly a violation of some provision of law" or whether in taking the action which they did they had "failed to observe and carry out the procedure provided by law" (p. 25).

Levine v. Farley, supra, also decided by this Court, well states the principle which is controlling here. In that case the plaintiff sought a writ of mandamus against the Postmaster General to compel plaintiff's reinstatement in a position from which he had been removed. Plaintiff charged that his dismissal was the result of unfair discrimination against him. The Court in affirming dismissal of plaintiff's action, pointed out that (p. 191) "the only question for decision is whether a court may go behind the official findings of the postal authorities and try questions of fact all over again. We think the rule is that this cannot be done." After considering some of the many cases on this point the Court concluded (p. 191), "In short, *the courts are powerless to review the merits of a valid charge.*"

In amplification of this principle the Court declared (p. 191);

But, even if all participated, the degrees of offending might very well have been different, and that question was submitted to the postal authorities upon the respective proceedings against all who participated. To weigh the question of guilt as between them would involve a retrial of the facts and, as we have already said, that is not our right, but a matter solely within the province of the postal authorities. Until Congress makes some provision to the contrary, *the facts must be settled by administrative officers of government*, and the trial court is not permitted to substitute its judgment for theirs, for to do so would be interfering with the discretion imposed by statute, and this is the sustained ruling on that subject.

We, therefore, hold that, where action is taken in removing from office an employee in the classified service and the action is in accordance with requirements of the statute relating thereto, such action is not reviewable by mandamus, and a court of law has no jurisdiction to inquire into the guilt or innocence of the employee as to the charges upon which he was removed.
[Italics supplied.]

In the case at bar there can be no serious suggestion that the charge of a reasonable doubt as to appellant's loyalty was other than a valid charge, fully authorized by the controlling regulations, and wholly within the jurisdiction of the Civil Service Commission.

One further case deserves special note. Plaintiff, in *Golding v. United States, supra*, was a classified civil service employee who was removed from office. The removal was made in accordance with the controlling procedural requirements. He brought suit for his salary alleging that he was not guilty of any of the charges against him and that he had been removed as the result of a conspiracy among various persons and officials; that his removal was based upon perjured testimony obtained through duress and undue influence; that the investigation was biased, prejudiced and unfair; that his superior was biased and prejudiced against him and had publicly stated that the plaintiff was guilty even before plaintiff had made written answer to the charges. In dismissing the complaint the Court declared (p. 685):

The allegations that the plaintiff was innocent of the charges preferred against him, that his removal was the result of a concerted action by certain individuals and officials who had entered into a conspiracy to cause his removal, that his removal was based on perjurious statements obtained through duress and undue influence, and that the investigation which resulted in his removal was biased, prejudiced, and unfair, are immaterial. *It is not within the jurisdiction of the court to inquire into the guilt or innocence of the plaintiff as to the charges upon which he was removed from office.* These charges were considered and passed upon by officials of the Bureau of Prohibition who had authority to act upon them. It appearing from the averments of the petition that every step requisite to the removal from office of an employee of the Government in the classified civil service was taken by Bureau officials in the plaintiff's case, their action in removing him from office is conclusive and is not subject to review by the court. [Italics supplied.]

Thus, appellant's effort in the case at bar to obtain a retrial and reexamination of some of the facts and circumstances which led to the Commission's determination that there was a reasonable doubt as to his loyalty to the Government of the United States must fail and was properly rejected by the Courts below. As we have shown, this effort on the part of appellant is not new. Many others in the same or analogous positions have attempted to obtain court review of the exercise of judgment

and discretion by the Executive in matters properly within its sphere of activity and jurisdiction. These attempts have always heretofore ended in failure. The courts, mindful of the separation of functions upon which our system of government rests, and alive to the confusion and mischief which a contrary rule would produce, have wisely resisted every such attempt.

No reason appears why a different rule should apply with respect to loyalty than applies with respect to any of the other factors which disqualify an applicant for Federal employment or which are cause for his removal, demotion, reprimand, or other disciplinary action. Reasonable doubt as to loyalty is merely another disqualifying factor or cause for removal along with many others which readily come to mind. If the determination of the Civil Service Commission on the issue of loyalty is to be reexamined and retried *de novo*, as appellant suggests, then the same result must follow in all cases in which an applicant for Federal employment claims that his disqualification on the ground of morals, or experience, or intelligence, or physical ability, or any of the other countless matters a prospective employer may properly take into consideration, was arbitrary, malicious, or not justified by the facts. Similarly, dismissal, demotion, or other disciplinary action taken by any of the executive departments or agencies with respect to a particular employee could be challenged in the courts and a complete review obtained of the facts underlying the determination made by the Executive as to the efficiency,⁷ honesty, punctuality, or any of the other many factors which may have caused the disciplinary action taken. For this reason, as well as others, it has become a firmly fixed principle of law that the courts, under our system, will not interfere with the internal administration of the Executive and will not retry the merits of the Executive's refusal to appoint a particular applicant, nor reexamine the truth or falsity of a valid charge which resulted in the dismissal of a Federal employee.⁸

The courts, as the cases above cited indicate, will inquire only if any law or Constitutional provision prohibits the action taken and if the requirements of applicable procedural statutes were observed. That no legal obstacle exists to the Government's inquiry, in time of war, into the loyalty of persons seeking Federal employment and to disqualify such per-

⁷ See *United States ex rel Taylor v. Taft*, *supra*, at p. 99.

⁸ To the contention sometimes made that the absence of judicial review may lead to abuse of power by the Executive, the answer has been made that, "Every government is deemed to be just to its citizens; its executive officers, equally with the judges of the courts, are personally disinterested; and why should not their decisions be as satisfactory and final." Catron, J., in *Decatur v. Paulding*, *supra*, at p. 522.

sons when the Civil Service Commission finds a reasonable doubt as to such loyalty, has not been denied by appellant and was, in fact, admitted below. There thus would properly remain only the procedural inquiry which is rendered unnecessary by appellant's abandonment before this Court of any claim that he has been unlawfully denied the procedural guarantees of the Lloyd-LaFollette Act.

Hence, unless this Court departs from the established rule and abandons the traditional role of the judiciary with respect to the internal administration of the Executive, appellees submit that this disposes of the instant case and plainly entitles them to an affirmance of the judgment entered by the Court below.

Nevertheless, while urging the application of the firmly established doctrine of judicial abstention in cases of this character, appellees have no wish to foreclose, nor any reluctance to permit, judicial inquiry, for under any view the result must be the same. Therefore, despite the settled law which should make further argument unnecessary, appellees shall address themselves to the two other points sought to be made by appellant, namely, (1) that, while the Civil Service Commission may in time of war properly inquire into the loyalty of those seeking Federal appointment, the Commission may not in making its determination on that factor of ineligibility examine into the political expressions, actions, or affiliations of such persons, and (2) that the decision made by the Civil Service Commission in the instant case was, on its facts, arbitrary and unreasonable.

POINT II

The action of the Civil Service Commission in looking to appellant's political expressions, actions, and affiliations in determining whether there was a reasonable doubt as to appellant's loyalty to the Government of the United States was not violative of the Constitution, any statute, or controlling rule or regulation

A. No constitutional rights of appellant have been infringed

Appellant, arguing that the Government as an employer does not have "absolute" power and may not attach "unlawful" conditions to granting Federal appointments (Br. 42, 44)—thus denying contentions which appellees in this case do not and are not required to make to justify their action under the Constitution—asserts that the Commission, in determining whether plaintiff was qualified under the War Service Regulations for a

War Service appointment, infringed his constitutional rights under the First and Fifth Amendments by investigating his political expressions, actions, and affiliations in order to discover whether there was a reasonable doubt as to his loyalty. While we shall consider the action of the Commission in the light of the Constitution in detail, and demonstrate its complete constitutional validity, it is seriously open to question whether the instant case presents any constitutional issue whatever.

For more than 100 years prior to the enactment of the Civil Service Act in 1883 practically all Federal employees were appointed and removed, advanced and demoted, on the basis of their political opinions and affiliations (United States Civil Service Commission, *History of the Federal Civil Service* (1941)). And although this practice was frequently deplored it was to our knowledge never held unconstitutional. Nor, indeed, was the unconstitutionality of the exercise of the executive power on this basis even suggested.⁹ In fact, the cases point in the opposite direction (*In the Matter of Hennen*, 38 U. S. (13 Pet.) 230 (1839); *White v. Berry*, 171 U. S. 366 (1898); *United States ex rel. Taylor v. Taft*, *supra*; *United States ex rel. Palmer v. Lapp*, 244 Fed. 377, 384-385 (C. C. A. 6th, 1917)), and it was only the constitutionality of civil service restrictions upon the Executive's power of appointment which were subject to constitutional doubts (see 13 Op. Atty. Gen. 516 (1871)).

In any event, investigation of a Federal employee's, or a prospective employee's, political utterances and affiliations to determine whether there is reasonable doubt as to his loyalty cannot be said to be an infringement of such person's freedom of speech. No prohibition is involved. No restraint is imposed. Certainly no previous restraint is involved, and it is that form of restraint which the First Amendment was mainly, although not perhaps entirely, designed to prevent. *Patterson v. Colorado*, 205 U. S. 454, 462 (1907); *Schenck v. United States*, 249 U. S. 47, 51-52 (1919); *Near v. Minnesota*, 283 U. S. 697, 721 (1931); *Lovell v. Griffin*, 303 U. S. 444, 451-452 (1938); 16 C. J. S. pp. 628-629. Moreover, liberty of speech is not an absolute right. *Near v. Minnesota*, *supra*, at 708; *Whitney v. California*, 274 U. S. 357, 371 (1927). " * * * the character of every act depends upon the circumstances in which

⁹ It is, of course, common knowledge that many offices and positions in the Federal service, not subject to the Civil Service Act, are filled and held solely on the basis of political affiliation without any intimation that this is violative of the fundamental law. See, for example, *United Federal Workers of America (C. I. O.) v. Mitchell*, 56 F. Supp. 621, 627 (Dist. Col. 1944).

it is done * * *. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." Holmes, J., in *Schenck v. United States*, *supra*, at p. 52.

Furthermore, to say, as plaintiff does, that the Government cannot thus look to a person's past acts or statements, to his detriment, without violating the First and Fifth Amendments is to deny the validity of what is a commonplace and a daily occurrence in every court in the land. For example, a man who makes violent threats against another and afterwards slays the one threatened cannot invoke the Constitution to protect him from proof of such threats on his trial for murder, notwithstanding he may have exercised the right of free speech when the threats were made. It is not an abridgement of free speech to test a man's faith or attitude by what he says freely, openly, and deliberately. In denaturalization proceedings, significantly, the right to introduce evidence of previous declarations, actions, and writings in order to establish or disprove loyalty and allegiance is unquestioned. *Luria v. United States*, 231 U. S. 9 (1913); *United States v. Schlotfeldt*, 136 F. (2d) 935, 938, 939 (C. C. A. 7th, 1943); *United States v. Kramer*, 262 Fed. 395 (C. C. A. 5th, 1919).

Again, assuming the conceded right of the Government in time of war to inquire into loyalty at all, that right has meaning only if the statements and acts of the person under consideration for appointment may be examined, for, as the courts have frequently declared, "loyalty is a matter of the heart and mind" (*Ex parte Endo*, 323 U. S. 283, 302 (1944); *Hirabayashi v. United States*, 320 U. S. 81, 107 (1943); *Schurmann v. United States*, 264 Fed. 917, 920 (C. C. A. 9th, 1920), app. dis. 257 U. S. 621 (1922)). In what other way, except by probing opinions, conduct, and affiliations, political in a broad sense, can doubts as to loyalty reasonably be resolved? As Wyzanski, D. J., declared in another context, "Saboteurs do not parade with foreign credentials of professional competence." *Von Knorr v. Miles*, 60 Fed. Supp. 962, 970 (D. Mass., 1945).

Nor can appellant successfully claim a deprivation of property without due process of law in contravention of the Fifth Amendment. It is plain that he could not have any "property" in his Federal employment. *Love v. United States*, 108 F. (2d) 43, 45-46 (C. C. A. 8th, 1939), cert. den. 309 U. S. 673 (1940); *Ligare v. Harries*, 128 F. (2d) 582, 583 (C. C. A. 7th,

1942); *People v. Crane*, 214 N. Y. 154, 170, 179-180 (1915); *Long v. Somervell*, 22 N. Y. Supp. (2d) 931, 175 Misc. 119 (1940), aff'd 27 N. Y. Supp. (2d) 445, 261 App. Div. 946 (1st Dept., 1941); *Stowe v. Ryan*, 135 Ore. 371, 296 Pac. 857 (1931). And this would be true even if he had received an absolute War Service appointment. A War Service appointment confers no fixed or definite tenure of employment. Persons so appointed do not "thereby acquire a classified (competitive) civil-service status but, in the discretion of the Civil Service Commission, may be retained for the duration of the war and for six months thereafter." Executive Order No. 9063, Paragraph 2. And, as the undisputed facts establish, appellant's appointment was not absolute but subject to a condition which was never satisfied.

While appellant does not directly challenge the procedure of the Civil Service Commission as a denial of administrative due process, he does assert that the hearings accorded him by the Board of Appeals and Review and the Civil Service Commission were "hardly conducive to any fair determination of the facts" (Br. 6), presumably because he was not confronted with the witnesses against him and given an opportunity to cross-examine them. But the record is clear that appellant's case was considered and reconsidered at least four times by the Commission itself or administrative bodies within the Commission (App. 50-52), and appellant was afforded every opportunity at practically every stage of the proceedings to present all of the evidence and testimony in his behalf which he could muster, without restriction. And he availed himself fully of that opportunity (App. 37-38). That a fairly conducted hearing such as was accorded appellant—"where all that * * * [he] * * * desired to say or offer was heard and received" (*United States ex rel. Milwaukee Publishing Co. v. Burleson*, 255 U. S. 407, 408 (1921)—satisfies all the requirements of due process of law, has been repeatedly decided. *United States ex rel. Milwaukee Publishing Co. v. Burleson*, *supra*, at 409; *Smith v. Hitchcock*, 226 U. S. 53, 61 (1912); *Bates & Guild Co. v. Payne*, 194 U. S. 106 (1904)).

The already demonstrated constitutional validity of the Commission's action becomes even more apparent when consideration is given to the broad powers the Federal Government possesses, and must possess, in its capacity as employer. While its authority in this area of internal administration may not perhaps be plenary, it is undeniable that it is extraordinarily great. Certainly its outer limits, if any, have not been definitely charted in any decision of the Supreme Court. Sufficient for

present purposes, however, is the fact that many decisions establish the wide latitude and discretion enjoyed by the Government under the Constitution in the selection of personnel for public work and in prescribing conditions and regulations governing their appointment and retention.

Thus, in *Atkin v. Kansas*, 191 U. S. 207 (1903), the Supreme Court, in upholding the constitutionality of an 8-hour law enacted by the State of Kansas prescribing such hours of labor in the performance of all State contracts on pain of criminal penalties, declared (pp. 222-224):

If, then, the work upon which the defendant employed Reese was of a public character, it necessarily follows that the statute in question * * * does not infringe the personal liberty of anyone. * * *

It cannot be deemed a part of the liberty of any contractor that *he* be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the State. On the contrary, *it belongs to the State, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities.* No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern.

If it be contended to be the right of everyone to dispose of his labor upon such terms as he deems best—as undoubtedly it is—and that to make it a criminal offense for a contractor for public work to permit or require his employe to perform labor upon that work in excess of eight hours each day, is in derogation of the liberty both of employes and employer, it is sufficient to answer that *no employe is entitled, of absolute right and as a part of his liberty, to perform labor for the State;* * * *

We rest our decision upon the broad ground that the work being of a public character, absolutely under the control of the State and its municipal agents acting by its authority, it is for the State to prescribe the conditions under which it will permit work of that kind to be done. Its action touching such a matter is final so long as it does not, by its regulations, infringe the personal rights of others; and that has not been done. [Italics supplied.]

See, in accord: *Ellis v. United States*, 206 U. S. 246 (1907) (sustaining similar Federal statute); *Heim v. McCall*, 239 U. S. 175 (1915) and *Crane v. New York*, 239 U. S. 195 (1915) upholding the validity of New York statute prohibiting employment of aliens on public works and, as between citizens, prescribing preference to be given citizens of New York.¹⁰

The broad sweep of the Government's authority and discretion in all phases of personnel administration has many times been announced. "It has been repeatedly adjudged that the courts have no general supervising power over the proceedings and action of the various administrative departments of government." *Keim v. United States*, *supra*, at 292. See also *Ex parte Curtis*, 106 U. S. 371 (1882); *Ex parte Hennen*, *supra*; *Hammond v. Hull*, *supra*; *United States ex rel Nalle v. Hoover*, 31 App. D. C. 311 (1908); *United States ex rel Palmer v. Lapp*, 244 Fed. 377, 382, 384-385 (C. C. A. 6th, 1917); *Ligare v. Harries*, *supra*; *Waterman v. Somervell*, *supra*; *Müller v. United States*, 45 C. Cls. 509 (1910); *Medrick v. United States*, 44 C. Cls. 469, 482 (1909). Cf. *Goodale v. County Commissioners*, 277 Mass. 144 (1931); *Commonwealth ex rel Rotan v. Hasskarl*, 21 Dist. Rep. 119 (Pa. 1912). The right to discriminate in favor of those who have served in the armed forces is illustrative. See Bartlett, C. J., concurring, in *People v. Crane*, *supra*, at 176; *Mayor of Lynn v. Commissioner of*

¹⁰The *Heim* and *Crane* cases are connected. In the New York Court of Appeals the opinions of the judges were written in the *Crane* case (214 N. Y. 154 (1915)) and the *Heim* case (214 N. Y. 629 (1915)) was decided on the grounds set forth in the *Crane* opinions; in the United States Supreme Court the *Heim* case served as the vehicle for the controlling opinion of the Court and the *Crane* case was affirmed on the basis of the *Heim* opinion.

Certain expressions of the judges of the New York Court of Appeals in their opinions sustaining the statute deserve attention. Cardozo, J., pointed out that (p. 163):

"If the government were to take over the railroads there would be force in the argument that the trains should be run by citizens on whose loyalty the government might depend in time of national disaster."

Bartlett, C. J., concurring, stated (pp. 173, 175):

"* * * the state in the prosecution of a public work stands in just the same position as an individual * * *

"I can find no reason to suppose, however, that the Fourteenth Amendment was designed to limit or restrict the rights of a state as an employer of labor. Other employers, individual or corporate, possess the undoubted and absolute right to withhold employment from whomever they see fit. The Constitution could hardly have been intended to deprive the states of equality with private employers in this respect; * * *

Seabury, J., concurring, said (p. 178):

"No citizen has any constitutional right or privilege to be employed upon public work, or any immunity against discrimination in this respect, either under article 1, section 1, of the Constitution of the state or under the Fourteenth Amendment to the Federal Constitution."

Civil Service, 269 Mass. 410 (1929); cf. *Bratton v. United States*, 90 C. Cls. 604, 605 (1940).

Particularly significant to the instant case is the fact that every court which has had occasion to pass upon the question has sustained the constitutionality of stringent restrictions and prohibitions upon all forms of political activity on the part of Government employees against the claim that such limitations abridged fundamental liberties. *United Federal Workers of America v. Mitchell*, 56 F. Supp. 621 (D. Col., 1944), cert. gr., argued December 3, 1945; *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N. E. 517 (1892); *Stowe v. Ryan*, *supra*; *Commonwealth ex rel Rotan v. Hasskarl*, *supra*; *Duffy v. Cooke*, 239 Pa. 427, 441 (1913); *Ricks v. Dept. of State Civil Service*, 200 La. 341, 370 (1942); cf. *United States v. Wurzbach*, 280 U. S. 396 (1930).

In *McAuliffe v. Mayor of New Bedford*, *supra*, Holmes, J., said (pp. 219-220):

This is a petition for mandamus to restore the petitioner to the office of policeman in New Bedford. He was removed by the mayor upon a written complaint, after a hearing, the mayor finding that he was guilty of violating Rule 31 of the police regulations of that city. The part of the rule which petitioner seems certainly to have violated is as follows: "No member of the department shall be allowed to solicit money or any aid, on any pretense for any political purpose whatever." *There was also evidence that he had been a member of a political committee, which likewise was prohibited.*
* * * *It is argued by the petitioner that the mayor's finding did not warrant the removal, that the part of the rule violated was invalid, as invading the petitioner's right to express his political opinions, and that a breach of it was not a cause sufficient under the statutes.*

One answer to this argument, assuming that the statute does not make the mayor the final judge of what cause is sufficient, and that we have a right to consider it (*Ham v. Board of Police*, 142 Mass. 90, 95, 7 N. E. Rep. 540; *Osgood v. Nelson*, L. R. 5 H. L. 636, 649), is that there is nothing in the Constitution or the statute to prevent the city from attaching obedience to this rule as a condition to the office of policeman, and making it part of the good conduct required. *The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not*

agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control. This condition seems to us reasonable, if that be a question open to revision here. [Italics supplied.]

This wide authority in matters pertaining to its own personnel is but one aspect of the larger doctrine that the Government has far greater power and latitude in regulating its internal affairs than in regulating public affairs. *Perkins v. Lukens Steel Co.*, 310 U. S. 113 (1940); *Truax v. Raich*, 239 U. S. 33, 39 (1915); *Hamilton v. Regents*, 293 U. S. 245 (1934) and *Waugh v. Mississippi University*, 237 U. S. 589 (1915) are further examples of the far-reaching authority of Government in the management of its internal affairs and in the solution of its internal problems.¹¹

The situation of Federal employees and those seeking Federal employment is perhaps best summarized by Woolsey, J. in *Gitlow v. Kiely*, 44 F. (2d) 227, 229 (S. D. N. Y., 1930), aff'd 49 F. (2d) 1077 (C. C. A. 2d, 1931), cert. den. 284 U. S. 648 (1931), in the statement made there in another connection:

The relation which an individual chooses to occupy towards society, or the privileges offered by society of which he may wish to avail himself, may, during the continuance of that relationship, or whilst he is availing himself of those privileges, necessarily limit, or wholly suspend the exercise of some of his constitutional rights, which are pro hac vice waived.

When there is added to the already broad powers of the Government as an employer, the increased authority under the Constitution which accrues to it from its war powers any constitutional objection to the Civil Service Commission's inquiry in time of war into the political beliefs, conduct and affiliations relating to loyalty of those, like plaintiff, seeking Fed-

¹¹ The Post Office cases (*Pike v. Walker*, 121 F. (2d) 37 (1941); *United States ex rel. Milwaukee Publishing Co. v. Burleson*, 255 U. S. 407 (1921); *Hannegan v. Esquire* (— U. S. —, 66 S. Ct. 456) (1946), cited by appellant (Br. p. 44), are to be discontinued on the ground that the postal system, while a Government function, is an integral part of American life and business and a statutory monopoly. Hence, regulation of the postal system constitutes public regulation rather than internal governmental administration.

eral appointment to important positions (app. 30), in national defense agencies, evaporates completely.¹²

The plenary character of the power to wage war and its extension to every matter relating to the carrying on of war have been repeatedly emphasized. As former Chief Justice Hughes remarked during the First World War, "the power to wage war is the power to wage war successfully." (Hughes, *War Powers under the Constitution*, 42 A. B. A. Rep. 232, 238.) See *Ashwander v. Valley Authority*, 297 U. S. 288, 326 (1936); *Home Bldg. & L. Assn. v. Blaisdell*, 290 U. S. 398, 426, 447-448 (1934); *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 161 (1919); *McKinley v. United States*, 249 U. S. 397 (1919); *Schenck v. United States*, *supra*; *Selective Draft Law Cases*, 245 U. S. 366 (1918); *Raymond v. Thomas*, 91 U. S. 712, 714-715 (1875); *Miller v. United States*, 78 U. S. (11 Wall.) 268 (1870); *Stewart v. Kahn*, 78 U. S. (11 Wall.) 493, 507 (1870) (" * * * the power is not limited to victories in the field. * * *")

Under the war powers, the Supreme Court has sustained the compulsory draft of persons to serve in the armed forces (*Selective Draft Law Cases*, *supra*); suppression of prostitution in military areas (*McKinley v. United States*, *supra*); prohibition of the sale of liquor even after hostilities had ceased (*Hamilton v. Kentucky Distilleries Co.*, *supra*; *Jacob Ruppert v. Caffey*, 251 U. S. 264 (1920)); Government operation of systems of communications (*Dakota Cent. Tel. Co. v. South Dakota*, 250 U. S. 163 (1919)); regulation of maximum prices (*Highland v. Russell Car Co.*, 279 U. S. 253 (1929)); and exclusion and curfew regulations directed, on grounds of doubtful loyalty, against an entire racial group composed of both aliens and citizens without distinction. *Hirabayashi v. United States*, *supra*; *Korematsu v. United States*, 323 U. S. 214 (1944).¹³

It is, of course, familiar doctrine that the exercise of governmental powers may interfere with one's liberty to a greater or lesser degree. The constitutional requirement of due process stands in the way only where the interference is of such

¹² Among the regulations prescribed by the Commission in Departmental Circular No. 393 of November 28, 1942, with respect to Executive Order No. 8516, August 15, 1940, is the following:

"3 (a). All Federal positions, appointments to which are governed by the War Service Regulations, shall be considered positions directly connected with national defense."

¹³ Moreover, apart from the war power committed to the President by the Constitution, the measures and the action herein could be sustained under Article II, Section 3, which provides that the President "shall take care that the laws shall be faithfully executed." See *In re Neagle*, 135 U. S. 1, 63-64 (1890).

character as to be wholly unreasonable, arbitrary, or capricious.

Thus, in sustaining provisions for compulsory vaccination in *Jacobson v. Massachusetts*, 197 U. S. 11 (1905), the Supreme Court said (p. 26);

But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members.

See also *Compagnie Francaise &c. v. Board of Health*, 186 U. S. 380 (1920); *Minnesota v. Probate Court*, 309 U. S. 270 (1940); *Moyer v. Peabody*, 212 U. S. 78 (1909); *United States v. Carolene Products Co.*, 304 U. S. 114, 154 (1938); Holmes, J., dissenting in *Meyer v. Nebraska*, 262 U. S. 390, 412 (1923). And since the reasonableness of the restraint must always be measured in terms of the surrounding circumstances, it is apparent that restrictions demanded by the exigencies of war may go far beyond the limits permissible in periods of tranquillity.

The disqualification of appellant for a War Service appointment because of reasonable doubt as to his loyalty is certainly far less drastic than compulsory military service or the curfew and exclusion measures sustained by the Supreme Court.

Von Knorr v. Miles, supra,¹⁴ presents a situation going far beyond the instant case, although at the same time bearing certain striking similarities to it. There, plaintiff, a naturalized citizen, was dismissed on August 13, 1943, from his private employment, which he had held for 6 years, solely due to the order to that effect of the defendant, the Commanding General of the First Service Command, directed to plaintiff's employer. The order was issued pursuant to an Executive Order (Executive Order No. 8972, December 12, 1941), and War Department instructions and directives authorizing defendant, in order to protect national defense facilities, to take "appropriate measures" (Executive Order No. 8972) including the "dismissal of subversives from private plants engaged in war production" (War Department Circular No. 57, February 20, 1943), when "adequate investigation reveals that there is good cause to suspect * * * an employee of sub-

¹⁴ The district court's judgment in this case was vacated by the Circuit Court of Appeals for the First Circuit on jurisdictional grounds, but that Court expressly stated that if there was jurisdiction it agreed with the opinion and decision of the district court. — F. (2d) — (C. C. A. 1, June 28, 1946), see 15 Law Week 2068.

versive activity." (War Department Administrative Instructions, January 10, 1942). The dismissal order was based upon an investigation conducted without the presence of plaintiff or his counsel, and plaintiff was at no time informed of the evidence or given an opportunity to examine the witnesses whose testimony was included in the investigation. In the manner provided by War Department procedure, plaintiff prosecuted an appeal to military authorities higher than defendant which was unsuccessful.

On the basis of the foregoing facts, plaintiff sought an injunction restraining defendant from interfering with his private employment and declaring invalid the defendant's order of dismissal directed to plaintiff's employer, as a deprivation of plaintiff's constitutional rights and liberties. Defendant moved for summary judgment which the Court, in a well-reasoned opinion, granted (p. 970):

Such an exclusion order is as plainly within the war power as the more drastic orders excluding persons from the public streets at nighttime, sustained in Hirabayashi's case, from an entire city, sustained in Korematsu's case, or from the Pacific Coast states, sustained in Endo's case, 323 U. S. p. 302, lines 16-20, 65 S. Ct. 208. All those orders interfered with employment, and on a much wider scale than here where plaintiff remains free to work for his former employer in jobs having no connection with war contracts and free to work for other employers in Massachusetts or elsewhere. It is true that the orders in those three Supreme Court cases were orders directed to an entire group on the basis of a military commander's doubts as to their loyalty, whereas here the order is directed to a particular person. *But if that be a distinction, it would seem that the order here was more, not less, justifiable because it rested on views as to an individual's loyalty rather than a group's loyalty.*

Moreover, quite apart from the precedents supplied by the cases of Hirabayashi, Korematsu, and Endo, it is clear on broad grounds of constitutional principle that an order excluding any person from a defense plant in wartime is valid.

* * * * *

To avoid grave risks a prudent government may rationally favor a policy denying access to war plants not only by a person proved dangerous but also by any person in whom the government lacks absolute confidence. [Italics supplied.]

Certainly, if the Government, under its war powers, may, under the circumstances of the *Von Knorr* case, constitutionally exclude suspected individuals from private war plants holding Government contracts, the constitutionality of the Government's action in disqualifying appellant in the instant case for a War Service appointment to an important position in an essential war agency of the Government itself, is not open to question.

B. No statute, controlling rule or regulation has been violated

The Government, pursuant to the controlling War Service Regulations, conducted an investigation to determine whether there was a reasonable doubt as to appellant's loyalty. In that investigation it perforce inquired into appellant's affiliations, declarations, and activities, political in a broad sense, which might cast light upon his loyalty. As a result of that investigation the Civil Service Commission concluded that a reasonable doubt existed and declared him ineligible for a War Service appointment. His conditional employment was thereupon terminated. Appellant contends that the investigation made was prohibited by the Civil Service Act, Civil Service Rule I, Section 2, and Section 9 (a) of the Hatch Political Activities Act. This contention is without foundation.

Nothing in the Civil Service Act denies the right of the Civil Service Commission to make the inquiry in question, nor does appellant point to any specific provision of the Act in support of his claim that the statute has been violated. Appellant refers to (Br. 11), but predicates no argument upon the 5th and 6th paragraphs of the second subdivision of Section 2. These obviously have no bearing upon the instant controversy relating as they do to prohibitions upon compulsory contributions to political funds and the use of official influence to coerce political action—matters wholly foreign to the case at bar.

Appellant, finding nothing in the Act itself to sustain his position, seeks recourse to history. But, even assuming the legal propriety of resorting to history where the statute is plain, in an effort to supply a provision not found therein, he can derive no assistance from the history of the Civil Service Act. It is common knowledge that the Civil Service Act of January 16, 1883, was enacted in response to widespread public feeling against the "spoils system" and in an effort to minimize and ultimately prevent the evils of patronage in the Federal public service. (See *History of the Federal Civil Service*, *supra*, at 1-52; *14th Ann. Rep. of the United States Civil Service Commission*; S. Rep. 576, 47th Cong., 1st Sess.) Nothing in its history suggests that the Civil Service Act was intended to be

other than a device to eradicate the wholesale removals and appointments along party lines with every change of administration which had been a feature of this country's political life since the early days of the Republic. There cannot be spelled out from its history, as there cannot be found in its terms, any restriction upon inquiry by the Commission into the expressions and affiliations of Federal employees or those seeking Federal appointment in order to determine whether any reasonable doubt as to their loyalty exists.

Not only is there nothing in the terms of the Civil Service Act or in its genealogy prohibiting such inquiry, but the War Service Regulations, pursuant to which such investigations are made, were promulgated, as pointed out above, *supra*, page 3, in response to an Executive Order (No. 9063, February 16, 1942) issued under the authority vested in the President by Section 2 of that Act. And the authority and discretion thus vested in the President is extremely broad.

Like the act of 1871, the civil service act itself contains no mandatory prescription of methods of selection to be employed; like the act of 1871, it leaves complete discretion in this respect in the hands of the President, who is empowered to promulgate "rules for carrying this act into effect." But unlike the act of 1871, it sets forth in general terms certain "fundamental provisions" which such rules shall contain. As even these provisions are to be embodied in the rules, however, only "as nearly as the conditions of good administration will warrant" and as the rules are in no wise limited to these provisions [The act states that the provisions mentioned shall be declared "among other things."], it is hardly too much to say that the nature of the power of regulation conferred on the President by the civil service act is virtually as unqualified as is that conferred by the act of 1871 (Mayers, *supra*, at 48-49).

The Attorney General has expressed the same view (30 Op. Atty Gen. 512, 515-516 (1916):

Section 2 of the civil service law merely directs what the rules to be promulgated by the President shall contain. They are not mandatory or absolute, for the statutory directions are only to be followed "as nearly as the conditions of good administration will warrant." A large discretion is, therefore, left to the President to modify the statutory directions if in his judgment such action should be required for the purposes of good administration. Nor are the statutory rules exclusive,

for it is provided that "*among other things*" the rules shall provide as set forth in the statute. (See *Johnson v. United States* (1905), 26 App. D. C. 128.) Thus the President is given wide power to supplement the statutory rules by others not specifically covered by the statute.

See, also, 23 Op. Atty. Gen. 595, 597 (1901); cf. *United States ex rel. Crow v. Mitchell, et al.*, 89 F. (2d) 805 (App. D. C., 1937) (language of last sentence of second subdivision of Section 2 of Civil Service Act contains sufficient authority for Presidential exception to the operation of the civil service rules as to be free from review in the courts through action of mandamus).

Rule I, Section 2 of the Civil Service Rules likewise does not aid appellant.¹⁵ This section of Rule I, which goes beyond any requirement of the Civil Service Act¹⁶ is not concerned with loyalty investigations and places no restriction upon them. It was directed, like the Act itself, against the "spoils system" and the evils of patronage. Thus, in the First and Third Annual Reports of the United States Civil Service Commission the following direct reference to the reasons underlying the adoption of Rule I, Section 2 is made (p. 12):

Congress and the Executive alike, in language of marked directness and significance, have sought to suppress the graver forms of these *evils of patronage*; * * * The President by declaring in the first rule that "official authority or influence shall not be used to coerce the political action of any person or body"; in Rule 8 that "*no discrimination shall be made by the appointing power by reason of political or religious opinion or affiliations*"; and in Rule 16, that "selections for appointment shall be made from the four highest in grade which shall be certified for appointment on the basis of merit shown on the examinations." [Italics supplied.]

Moreover, if any conflict existed between Rule I, Section 2, and War Service Regulation II, Section 3, the latter would prevail, for Executive Order No. 9063 by which the President authorized the preparation and adoption of the War Service Regulations provides in Paragraph 1 thereof that "the pro-

¹⁵ Appellant places no reliance upon Section 1 of Rule I, the source of Section 9 (a) of the Hatch Act, presumably because it applies in terms only to those in the "competitive classified service."

¹⁶ See Mayers, *supra*, at p. 92.

cedures and regulations thus adopted and prescribed shall be binding with respect to all positions affected thereby which are subject to the provisions of the Civil Service Act and rules.”¹⁷

Appellant's claim that the third sentence of Sec. 9 (a) of the Hatch Act forbids the inquiry into his loyalty to the Government of the United States made by the Civil Service Commission in this case overlooks the source of this provision and the exact language of the sentence itself.

Section 9 (a) of the Hatch Political Activities Act was drawn almost *verbatim* from Civil Service Rule I, Section 1, first promulgated June 3, 1907 (*24th Ann. Rep. of the Civil Service Commission*, p. 104). In a message accompanying his approval of the Hatch Act, President Roosevelt noted that Section 9 (a) applies “to all employees of the Federal Government (with a few exceptions) the rules to which the civil-service employees have been subject for many years.”¹⁸ For more than 30 years prior to the enactment of the Hatch Act the Commission in its administration of Civil Service Rule I, Section 1, interpreted this provision in the light of the purposes of the Civil Service Act pursuant to which it was issued, namely, correction of the evils arising from the participation by Federal employees in partisan political activities (see *24th Am. Rep. of the Civil Service Commission*, p. 7). Under this interpretation both the restrictions and the protection of Rule I, Section 1, were concerned only with partisan party politics,¹⁹ and have nothing to do with activities, affiliations, and declarations which bear upon the loyalty of Federal employees. It is well settled that under these circumstances—nothing in the Act itself or its legislative history²⁰ indicating a contrary purpose—the long continued administrative interpretation will ordinarily be adopted in construing the statute. Crawford, *Statutory Construction* (1940) 421, 441; 25 R. C. L. Section 277, p. 1052; see *United States v.*

¹⁷ War Service Regulation XI provides that the War Service Regulations “shall supersede civil service rules III, V, VI, VII, VIII, IX, X, and all provisions of joint regulations inconsistent with these regulations * * *.” Civil Service Rule II is not specifically named since the Commission, in accordance with its established interpretation of that Rule, saw no inconsistency between its requirements and War Service Regulation II, Section 3 (g). *Hearings Before the Subcommittee of the Committee on Appropriations, H. of Rep., 78th Cong., 2d Sess., on the Independent Offices Appropriation Bill for 1945*, pp. 1083, 1084, 1087. See also, *Action of Commission, April 3, 1942, Civil Service Act, Rules and Regulations Annotated* (1943), at p. 43.

¹⁸ S. Doc. 105, 76th Cong., 1st Sess., p. 1.

¹⁹ See, *United States Civil Service Commission, Political Activity and Political Assessment of Federal Office Holders and Employees* (1944).

²⁰ *Hatch Acts, Legislative and Documentary History*, Claims Division Library, Department of Justice.

Ickes, 98 F. (2d) 271, 280 (App. D. C., 1938); *United States ex rel Edwards v. Root*, 22 App. D. C. 419, 431 (1903); cf. *Willis v. Eastern Trust & Banking Co.*, 169 U. S. 295 (1898); *Davis v. Department of Labor*, 317 U. S. 249 (1942), rehearing denied 317 U. S. 713 (1943); *Wright v. Wardman*, 5 F. (2d) 380, 55 App. D. C. 318 (1925).

Even more plainly negating the validity of appellant's contention with respect to the Hatch Act, as the Court below pointed out (App. 70), is the language of the very provision upon which reliance is placed. Federal employees by its terms "retain the right * * * to express their opinions on all political subjects * * *." In other words, Federal employees are to have the same rights in this respect as the citizenry at large. They are not to be discriminated against on this ground merely because they are Federal employees. There has been no such discrimination in this case. Appellant was not disqualified because of his activities and affiliations as a Federal employee. He was found ineligible for appointment under regulations admittedly equally applicable to all persons, without distinction, seeking a War Service status. He has thus retained the same rights in this respect as all members of the general public. And that no constitutional rights of any person have been infringed is demonstrated in our discussion above (*supra*, pp. 42-62).

Indeed, it is inconceivable that any such restriction as that suggested by appellant could exist and thus prevent the Government in time of war from passing upon the loyalty of its employees and those seeking appointment—especially in a war agency—and excluding those in whom it lacked complete confidence. For, as we have seen, loyalty cannot be effectively determined apart from the consideration of certain political affiliations, expressions, and conduct. Were appellant's views to prevail it would mean that all persons otherwise qualified were equally eligible for employment regardless of their primary allegiance to or primary interest in the welfare of a foreign power. It cannot be supposed that the Government is so impotent to provide for its own protection.

From every point of view, therefore, the Commission's action was clearly lawful and did not contravene any provision of the Constitution, any applicable statute, or any controlling rule or regulation.

POINT III

The determination of the Civil Service Commission is conclusive on the facts and, in any event, was reasonable and supported by evidence

If this Court should sanction a complete departure from the long-established rule of judicial abstention from intervention in or reexamination of the merits of internal administrative decisions of the Executive, and review the detailed factual basis of the Civil Service Commission's determination despite this principle and the absence of any provision for judicial review in the Civil Service Act ²¹ the result, it is submitted, is the same. And this, although the Civil Service Commission is an administrative agency which acts "by decision rather than by order," and hence does not require a procedure of judicial type and does not attempt to prepare a record with judicial review in mind. (Blachley & Oatman, *Federal Regulatory Action and Control* (1940), p. 47).

But before the Court makes any factual inquiry it must first decide that the factual determination of the Commission in this case is not conclusive. The general rule is clear that where "a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched." *Gray v. Powell*, 314 U. S. 402, 412 (1941). Especially is this true where, as here, the broadest discretion over matters affecting personnel has been vested by Congress by the Civil Service Act (*supra*, p. 64) in the President and the Civil Service Commission, and by the President in the Commission by Executive Order No. 9063. Thus, in *United States v. Wright*, 78 U. S. (11 Wall.) 648 (1870), the Supreme Court declared (p. 650):

The section did not go further and prescribe rules to govern the action of the Postmaster General, nor did it seek to interfere with the judicial discretion of that officer. Congress constituted him the sole judge to determine not only whether the exigencies in the case had arisen, but if they had, the manner and extent of the allowance, and it is not competent for court or jury to revise his decision, nor is it re-examinable anywhere else, as there is no provision in the law to that effect. *It may be safely laid down as a general rule, says Story, Judge, "that where a particular authority is confided to*

²¹ Where Congress has intended that there be judicial review of decisions of the Civil Service Commission, it has so provided. See Section 12 (c) of the Hatch Act (18 U. S. C. 61L (c)).

a public officer to be exercised by him in his discretion, upon an examination of facts, of which he is made the appropriate judge, his decision upon these facts is, in the absence of any controlling provisions, absolutely conclusive as to the existence of those facts. [Italics supplied.]

And, in *Bates & Guild Co. v. Payne*, 194 U. S. 106 (1904), the Court, reviewing the cases, summarized the rule on this subject as follows (pp. 109-110):

The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing. [Italics supplied.]

See, also, to the same effect, *Gitlow v. Kiely*, *supra*, at p. 228:

But assuming that the decisions of the Civil Service Commission, if reviewable, are tested by the standard previously mentioned—largely applied only to fact-finding boards, not to administrative agencies like the Civil Service Commission—it is plain that the decision in this case meets the standard: It is supported by evidence even if confined to the matters specifically mentioned in the Commission's letter of June 5, 1944.

Appellant admits (App. 9, 35), that he was not merely a member, but was "prominently and actively affiliated" with the American Peace Mobilization, "participated actively in their meetings and affairs" and was "active in the affairs of the Washington Peace Mobilization and served on several of its committees." On this basis alone the Commission was fully justified in concluding that it did not have requisite confidence in appellant's loyalty and that appellant was thus ineligible for a War Service appointment.

The Attorney General has found that American Peace Mobilization (of which the Washington Peace Mobilization was a subsidiary) was a Communist-inspired and Communist "front" organization:

American Peace Mobilization was formed in the summer of 1940, under the auspices of the Communist Party and the Young Communist League as a "front" organi-

zation designed to mold American opinion against participation in the war against Germany. Its existence terminated within a month after the German invasion of Russia, when it became American People's Mobilization and adopted a program favoring complete assistance to Britain, Russia, and China. * * *

* * * American Peace Mobilization sponsored the march on Washington, January 25-27, 1941, when the delegates attempted to picket the Capitol and to see congressional and administration leaders. Later, on April 4 and 5, 1941, it sponsored the so-called American People's Meeting in New York City. These meetings were dominated by leaders of Communist-front organizations and the programs and pamphlets issued in connection with these meetings contained advertisements and greetings of Communist-penetrated organizations.

* * * Each of the foregoing positions (taken by American Peace Mobilization) conformed exactly to the Communist Party line. American Peace Mobilization numbered among its officers and sponsors several leading Communists and the heads of several Communist-penetrated groups.

Ever since 1918, and before, there have been in existence in the United States organizations devoted to peace and to the goal of keeping America out of war. Not one of these organizations, however, was formally represented as an organization in any way in American Peace Mobilization. These organizations devoted to antiwar activities have been continuously ignored in the columns of the Daily Worker and other Communist publications, whereas these same periodicals gave full support to American Peace Mobilization.²²

While mere membership alone might perhaps be inconclusive, "prominent and active" participation is far more significant.

²² Memorandum of Attorney General reprinted in full in Special Committee on Un-American Activities, House of Representatives, 78th Cong., 2d Sess., *Investigation of Un-American Propaganda Activities in the United States* (Vol. 17), pp. 10282-10284. See, also, *Report of Joint Fact-Finding Committee on Un-American Activities in California*, 55th Calif. Legis. (1943), pp. 93-96; *Report of Joint Fact-Finding Committee on Un-American Activities in California*, 56th Calif. Legis. (1945), p. 90; *Matter of Miller*, United States Department of Labor, Opinion of August 1, 1941 (at p. 7):

"American Peace Mobilization was not merely an isolationist or pacifist group, but was an instrument of the Communist Party."

It is not unreasonable to believe that active participation in the internal affairs and operation of an organization is strong evidence of sympathy with and a belief in the basic purposes, policies, and objectives of the organization and indicates common cause with the dominant leadership of such organization. The American Peace Mobilization and Washington Peace Mobilization in which plaintiff admittedly participated "actively and prominently" were regarded, as we have shown, both by executive and congressional authorities²³ as Communist-dominated and Communist-controlled organizations which adhered closely, if indeed, not exactly, to the Communist Party line.

In connection with its heavy wartime duty of investigating and determining with respect to several hundred thousand persons seeking Federal employment, the question of "a reasonable doubt as to * * * loyalty to the Government of the United States" the Commission, on the basis of the wide experience thus obtained, formulated tests or standards to be used in weighing the matters contained in the reports and records of investigation. In addition to plaintiff's active and prominent participation in American Peace Mobilization and Washington Peace Mobilization, the Commission also applied in plaintiff's case the "Communist Party Line" test of loyalty. The Communist Party Line test of loyalty employed by the Civil Service Commission is set forth in full in Appendix "B," annexed hereto. It is in the light of this standard that the changes in appellant's attitude toward the war referred to in the letter of June 5, 1944, and the particular timing of those changes becomes significant. In brief, the Communist Party Line test deals with the three major changes in recent years in the foreign policy line adopted by the Communist Party:

Revolutionary Period—1929 to December 1934: No distinction was made between fascist and democratic governments. They were all capitalistic and had to be destroyed by a revolution and replaced by a proletarian dictatorship.

Collective Security Period—December 1934 to August 1939: Hitler became a threat to the Soviet Union. Opposition to the fascist governments. Support of collective security or a united front of the democracies and the Soviet Union against fascist nations.

Commu-Nazi Period—August 1939 to June 1941: The period of the Stalin-Hitler pact. Opposition to the war as imperialist. Support of an isolationist position. Support of the peace policy of the Soviet Union.

²³ See *supra*, fn. 19, p. 38.

Collective Security Period (Revived)—June 22, 1941, to end of war: Hitler attacked the Soviet Union. Support of the war against fascism. Demand for a second front to aid the struggle of the Soviet Union.

As the Civil Service Commission's "Communist Party Line" test of loyalty declares, "a good definition of a Communist is 'one who has followed the Communist Party line through one or more changes'" (Appendix "B"). Appellant admittedly fits this definition.²⁴ (App. 9, 35.)

Civil Service Commissioner Arthur S. Flemming, testifying before the Subcommittee of the Committee on Appropriations of the House of Representatives (78th Cong., 2d sess.), has stated the Commission's position and the principles governing its loyalty investigations, especially with reference to those charged with following the Communist Party Line:

* * * the Commission has the responsibility of developing the evidence on both sides of the case. * * *

* * * The Commission * * * must assume the responsibility of making sure that just as much care has been exercised in developing favorable evidence as has been exercised in developing unfavorable evidence. Otherwise, we would be arriving at conclusions with just one side of the case having been presented to us in an adequate manner.

* * * the Commission keeps in mind the fact that working for the Government is a privilege which is extended to citizens of this country, and is not a right. No applicant or appointee can demand that the records before us prove beyond reasonable doubt that he is guilty of some of the accusations made against him. On the contrary, *the record must establish that he is a fit person to be entrusted with the duties which devolve upon a public official in time of war.*

We are in the business of seeing to it that the Government obtains the best qualified available personnel for its war jobs. We do not conceive it to be our function to ask the people of this country to take a chance on an individual simply because it has not been estab-

²⁴The Communist Party line test has been frequently cited. See, e. g., Report of the Special Committee on Un-American Activities, H. Rep., 78th Cong., 2d sess., *Investigation of Un-American Propaganda Activities in the United States*, H. of Rep. No. 1311 (1944), p. 186; *Matter of Müller, supra*, at pp. 6-7; *Statement of Elmer Davis*, former Director of the Office of War Information, May 25, 1942 (C. B. S.) (pertinent portions of this broadcast set forth in Appendix "C", annexed hereto).

lished that he really belongs in jail, instead of in a governmental job. In this connection we do believe, however, that an applicant or appointee has the right to insist that, in determining whether he is a fit person to be entrusted with the duties of a Government job, we do so in a fair-minded and objective manner.

* * * * *

No one has questioned the Commission's right to inquire as to whether or not a person is pro-Fascist, pro-Nazi, or pro-Japanese.

The Commission believes that a member of the Communist party, or a follower of the Communist Party line has clearly indicated that his primary loyalty is to a foreign political group owing its allegiance to a foreign government and that there is, therefore, a strong presumption in favor of his willingness to take steps designed to overthrow our constitutional form of government, if directed so to do. Clearly we are justified in classifying such a person as a potentially disloyal person.

* * * * *

* * * it follows from what has just been said that the Commission holds to the point of view that an applicant or appointee found to be a member of the Communist Party, or found to be a follower of the Communist Party line, has no place in the Government in time of war, or in time of peace. Such person has clearly indicated that he is willing to take orders from a political group located in a foreign nation, and whose first loyalty is to a foreign government. Such a person cannot, should not, and must not be entrusted with the duties and responsibilities of a public official.

Such a policy does not reflect any lack of genuine enthusiasm for the tremendous contribution which the Soviet Government and the Soviet people have made to the winning of this war. Such a policy is just a plain recognition of the fact that man cannot serve two masters, for, sooner or later, he will hate the one, and love the other. It is absolutely impossible to imagine the Soviet Government following a policy of tolerating, as one of their public officials, a Soviet citizen whose primary loyalty was to a political group whose primary loyalty was, in turn, to any foreign government.

* * * the Commission keeps in mind that the question of whether an applicant or an appointee is a Communist, or is a follower of the Communist Party line, is

not one which can be determined solely on the basis of the organizations to which he has belonged. * * *

* * * it is recognized that continued membership in or active leadership in certain organizations which most genuine liberals dropped out of as soon as they learned about what they stood for, does at least create a presumption in favor of the conclusion that the individual concerned is a follower of the Communist Party line. * * *

* * * if it cannot be established that an appointee or an official has formally affiliated himself with the Communist cause (and it is, of course, very seldom that this fact can be established) the Commission believes that the primary emphasis in an investigation should be placed on determining whether or not the appointee or applicant followed the "Communist Party line" through one or more of its recent changes.

When it can be established that an appointee or an applicant has followed the "Communist Party line" through one or more of its recent changes, we believe that such a person has no business occupying a Government position. He has demonstrated that, under certain circumstances, his primary loyalty is to a political group affiliated with a foreign government. Therefore, he cannot be trusted in a Government position.

* * * any person who is primarily loyal to a political group whose primary loyalty, in turn, is to a foreign government, is a person who at any time may move in the direction of overthrowing our constitutional form of government. *Certainly he can without question be classified as a potentially disloyal person, and the doubt thus created certainly should be resolved in favor of the Government.* [Italics supplied.] ²⁵

In view of all of the foregoing and appellant's admitted active, prominent, and official participation in American Peace Mobilization and Washington Peace Mobilization, and his following of the Communist Party Line in one of its major changes,

²⁵ *Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 78th Cong., 2d Sess., Independent Offices Appropriation Bill for 1945 (December 9, 1943), pp. 1083-1087.*

it is at least not an unreasonable inference that appellant, while perhaps not an actual member of the Communist Party as such, was sympathetic to and an adherent of its program and policies. The overwhelming weight of authority is that the Communist Party advocates the overthrow of the Government by force and violence.²⁶ In the following cases, among others,²⁷ it was held, or stated in dictum, or tacitly assumed, or judicially noticed, that the Communist Party advocated force and violence: *United States v. Wallis*, 268 Fed. 413 (S. D. N. Y., 1920); *Skeffington v. Katzeff*, 277 Fed. 129 (C. C. A. 1st, 1922); *Antolish v. Paul*, 283 Fed. 957 (C. C. A. 7th, 1922); *Ungar v. Seaman*, 4 F. (2d) 80 (C. C. A. 8th, 1924); *Ex parte Jurgans*, 17 F. (2d) 507 (D. Minn., 1927); *United States ex rel. Fortmueller v. Commissioner*, 14 F. Supp. 484 (S. D. N. Y., 1936); *In re Saderquist*, 11 F. Supp. 525 (D. Mo., 1935); *United States v. Smith*, 2 F. (2d) 90 (W. D. N. Y., 1924); *United States ex rel. Kettunen v. Reimer*, 79 F. (2d) 315 (C. C. A. 2d, 1935); *United States ex rel. Ohm v. Perkins*, 79 F. (2d) 533 (C. C. A. 2d, 1935); *United States ex rel. Yokinen v. Commissioner*, 57 F. (2d) 707 (C. C. A. 2d, 1932); *Berkman v. Tillinghast*, 58 F. (2d) 621 (C. C. A. 1st, 1932); *Wolck v. Weedin*, 58 F. (2d) 928 (C. C. A. 9th, 1932); *Jurgans v. Seaman*, 25 F. (2d) 35 (C. C. A. 8th, 1928); *Kenmotsu v. Nagle*, 44 F. (2d) 953 (C. C. A. 9th, 1930); *United States v. Tapolcsanyi*, 40 F. (2d) 255 (C. C. A. 3rd, 1930); *United States ex rel. Vojewvic v. Curran*, 11 F. (2d) 683 (C. C. A. 2d, 1926); *Kjar v. Doak*, 61 F. (2d) 566 (C. C. A. 7th, 1932); *Vilarino v. Garrity*, 50 F. (2d) 582 (C. C. A. 9th, 1931); *Murdoch v. Clark*, 53 F. (2d) 155 (C. C. A. 1st, 1931); *Branch v. Cahill*, 88 F. (2d) 545 (C. C. A. 9th, 1937); *United States ex rel. Fernandes v. Commissioner*, 65 F. (2d) 593 (C. C. A. 2d, 1933).

The Supreme Court has not passed upon the question: *Kessler v. Strecker*, 307 U. S. 22, 33, (1939); *Schneiderman v. United States*, 320 U. S. 118 (1943).

²⁶ There are cases to the contrary: *Strecker v. Kessler*, 95 F. (2d) 976, 96 F. (2d) 1020 (C. C. A. 5th, 1938), aff'd on other grounds 307 U. S. 22 (1939); *Ex parte Fierstein*, 41 F. (2d) 53 (C. C. A. 9th, 1930); *Colyer v. Skeffington*, 265 Fed. 17 (D. Mass., 1920), reversed *sub nom Skeffington v. Katzeff*, 277 Fed. 129 (C. C. A. 1st, 1922).

²⁷ In *Powell v. Unemployment Compensation Board of Review*, 146 Pa. Sup. Ct. 147, 150-152 (1941), the Court declared:

"* * * courts have long recognized and have taken judicial notice that Communism, as a political movement, is dedicated to the overthrow of the government of the United States * * * by force and violence. * * *

"For ourselves, we are not willing to say that courts are such impotent instruments of government that they may not take judicial notice of facts so well known to the man on the street."

The attitude of Congress toward Communists is illustrated by the Act of June 26, 1940, Ch. 432, Section 15 (f); Act of July 1, 1941, Ch. 266, Section 10 (f); and Act of July 2, 1942, Ch. 479, Section 9 (f) providing that—

No alien, no Communist and no member of any Nazi Bund organization shall be given employment or continued in employment on any work project prosecuted under the appropriations contained in this resolution. * * *

We submit that on the basis of the matters set out in the Commission's letter to appellant of June 5, 1944, alone, it cannot be said that the Commission's determination that there was a reasonable doubt as to appellant's loyalty to the Government of the United States and that he was therefore ineligible for a War Service appointment was arbitrary or unreasonable. Certainly reasonable men could so find. Indeed, the Commission's conclusion, founded upon its own broad experience and buttressed by both executive and congressional authority, was eminently reasonable and supported by substantial evidence.

POINT IV

Under any circumstances appellant was not entitled to the relief requested

Appellants sought injunctive, mandatory, and declaratory relief. It is submitted that under any circumstances appellant was not entitled to the relief requested.

With respect to the injunctive relief sought the rule laid down by the Supreme Court in the leading case of *White v. Berry*, *supra*, at p. 377, quoting from *In re Sawyer*, 124 U. S. 200, 212 (1888), is decisive:

* * * it is * * * well settled that a court of equity has no jurisdiction over the appointment and removal of public officers * * *

So unquestioned has been the rule thus established that subsequent Federal decisions in point appear to be lacking, but the rule has been often repeated. See, e. g., *Walton v. House of Representatives*, 265 U. S. 487, 490 (1924); *Morgan v. Nunn*, 84 Fed. 551 (C. C. Tenn. 1898); *People v. Finnegan*, 378 Ill. 387, 394-401 (1941); *Welker v. Lathrop*, 210 N. Y. 434 (1914).

As to the mandatory relief requested, insofar as it partakes of injunctive or equitable relief—mandamus as such having been abolished (Federal Rules of Civil Procedure, Rule 81

(b))—it is governed by the rule just stated. Insofar as it is still subject to the same principles which formerly controlled the administration of mandamus (*Hammond v. Hull, supra*, at p. 25), the mandatory relief sought runs directly counter to the fixed rule announced in literally scores of decisions that—

the only acts to which the power of the courts, by mandamus, extends, are such as are purely ministerial, and with regard to which nothing like judgment or discretion, in the performance of his duties, is left to the officer; * * * whenever the right of judgment or decision exists in him, it is he, and not the courts, who can regulate its exercise. (*United States ex rel. Goodrich v. Guthrie*, 58 U. S. (17 How.) 284, 303-304 (1854)).

Accord: *Decatur v. Paulding, supra*; *Boynton v. Blaine*, 139 U. S. 306, 319 (1890); *United States ex rel. Dunlap v. Black*, 128 U. S. 40, 48 (1888); *United States ex rel. U. S. Borax Co. v. Ickes*, 98 F. (2d) 271, 281 (App. D. C. 1938), cert. den., 305 U. S. 619 (1938) ("The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable"); *United States ex rel. Edwards v. Root*, 22 App. D. C. 419, 429-430 (1903).

The instant case, dealing as it does with the selection and rejection of Government personnel, involves the constant exercise of judgment and discretion on the part of the officers, including appellees, charged with the responsibility for making such decisions. (*Keim v. United States, supra*, at 293). Mandamus will not lie. *United States ex rel. Taylor v. Taft, supra*, at p. 98; *Levine v. Farley, supra*, at p. 191; *United States ex rel. Crow v. Mitchell, supra*.

Nor is the disability cured or avoided by requesting a declaratory judgment. This was recognized in *Doehler Metal Furniture Co. v. Warren*, 129 F. (2d) 43, 45 (App. D. C., 1942), when the Court stated:

* * * Thus we hold that the power to issue writs of mandamus does not give a court such general jurisdiction over the agency or subject matter as to enable it to choose another form of relief, the declaratory judgment, for cases in which the writ of mandamus itself could not be issued.

See also, *Love v. United States, supra*, at p. 50; cf. Borchard, *Declaratory Judgments* (2d ed., 1941), p. 878.

Furthermore, much of the relief requested goes far beyond the issues and limits of this case. For example, appellant prayed

that the Civil Service Commission be enjoined from "interfering in *any way* with the plaintiff's reinstatement with the War Manpower Commission." Assuming that appellant was improperly disqualified and removed on grounds of loyalty—the sole issue in this case—the Civil Service Commission cannot thereby be barred from considering, as it does in every case, any and all other possible disqualifying factors. The same is true of appellant's request that the Commission be restrained from "interfering in any way with the plaintiff's * * * employment in any other position for which he is eligible, with any other agency of the United States Government." This prayer is also subject to the additional infirmity that it seeks to prevent the agency which determines eligibility for many Government positions from interfering with appellant's appointment to any position "for which he is eligible"—an obvious contradiction. Also, in requesting that the Civil Service Commission thus be *forever* foreclosed from considering *any* disqualifying factor so far as appellant is concerned, appellant has plainly prayed for relief not warranted in any view of the case.

CONCLUSION

For the reasons above stated, it is respectfully submitted that the decision and order of the Court below granting appellees' motion for summary judgment and denying that of appellant should be affirmed.

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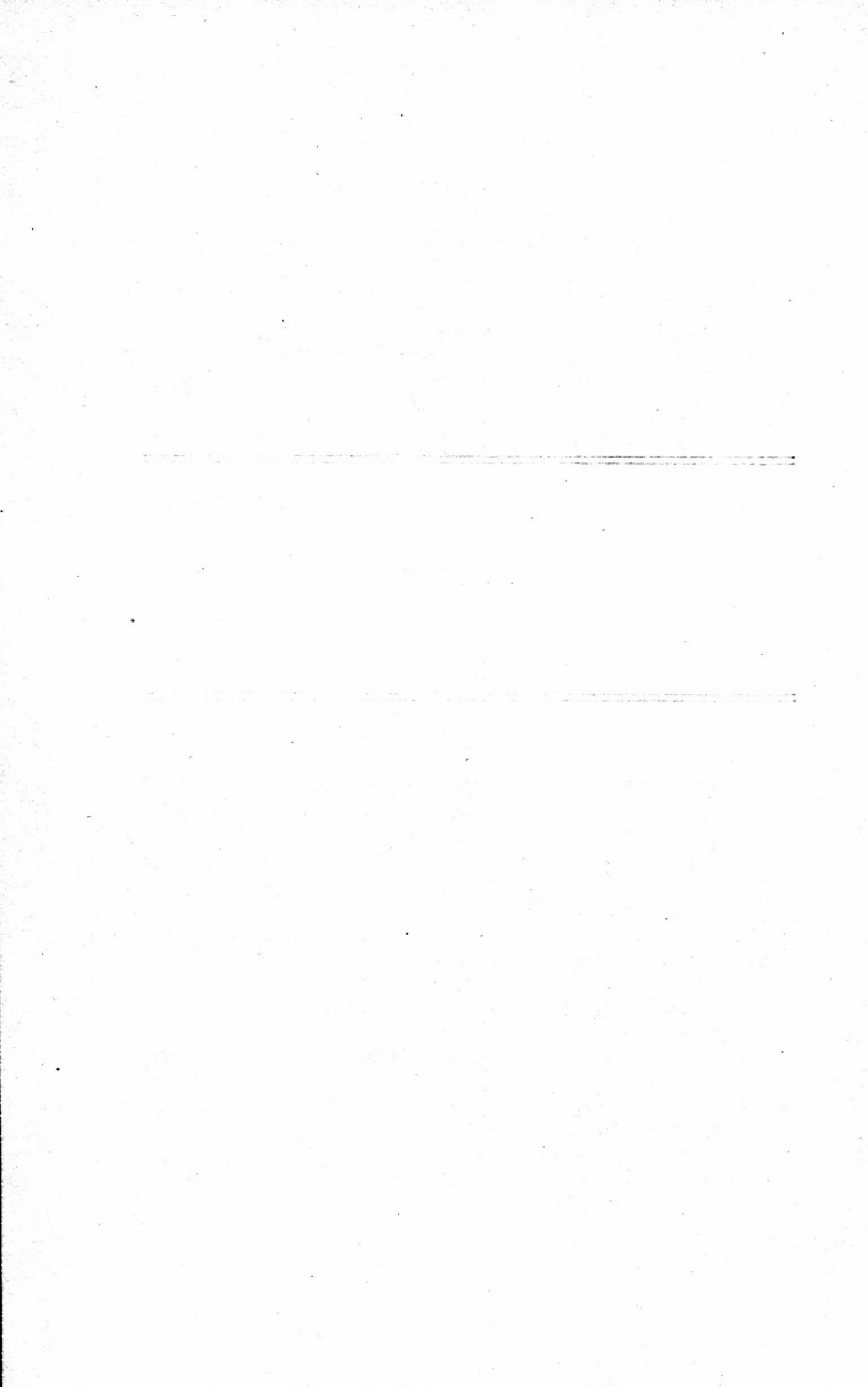
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APPENDIXES



APPENDIX A

1. SECTION 1753 OF THE REVISED STATUTES

[Act of March 3, 1871, 16 Stat. 514; 5 U. S. C. 1940 ed. 631]

The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and may prescribe their duties, and establish regulations for the conduct of persons who may receive appointments in the civil service.

2. CIVIL SERVICE ACT

AN ACT TO regulate and improve the civil service of the United States (Act of January 16, 1883, 22 Stat. 403; 5 U. S. C. 1940 ed. 632 et. seq.; 40 U. S. C. 1940 ed. 42)

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President is authorized to appoint, by and with the advice and consent of the Senate, three persons, not more than two of whom shall be adherents of the same party, as Civil Service Commissioners, and said three commissioners shall constitute the United States Civil Service Commission. * * **

SEC. 2. That it shall be the duty of said commissioners:

First, To aid the President, as he may request, in preparing suitable rules for carrying this act into effect, and when said rules shall have been promulgated it shall be the duty of all officers of the United States in the departments and offices to which any such rules may relate to aid, in all proper ways, in carrying said rules, and any modifications thereof, into effect.

Second, And, among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:

First, for open, competitive examinations for testing the fitness of applicants for the public service now classified or to be classified hereunder. * * *

Second, that all the offices, places, and employments so arranged or to be arranged in classes shall be filled by selections according to grade from among those graded highest as the results of such competitive examinations.

* * * * *

Fourth, that there shall be a period of probation before any absolute appointment or employment aforesaid.

Fifth, that no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so.

Sixth, that no person in said service has any right to use his official authority or influence to coerce the political action of any person or body.

* * * * *

Eighth, * * * And any necessary exceptions from said eight fundamental provisions of the rules shall be set forth in connection with such rules, and the reasons therefor shall be stated in the annual reports of the Commission.

* * * * *

3. CIVIL SERVICE RULES

By virtue of and pursuant to the authority vested in me by the Constitution, by section 1753 of the Revised Statutes (U. S. C., title 5, sec. 631), by the Civil Service Act of January 16, 1883 (22 Stat. 403), and as President of the United States, the civil service rules are hereby amended, effective February 1, 1939, to read as follows:

RULE I. POLITICS AND RELIGION

1. NO INTERFERENCE WITH ELECTIONS.—No person in the executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the results thereof. Persons who by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express their opinions on all political subjects, shall take no active part in political management or in political campaigns.

* * * * *

RULE XV. WITHHOLDING SALARY

LEGAL APPOINTMENT NECESSARY TO COMPENSATION.—Whenever the Commission finds, after due notice and opportunity

for explanation, that any person has been appointed to or is holding any position, whether by original appointment, promotion, assignment, transfer, or reinstatement, in violation of the Civil Service Act or Rules, or of any Executive order or any regulation of the Commission, or that any employee subject thereto has violated such Act, Rules, orders, or regulations, it shall certify the facts to the proper appointing officer with specific instructions as to discipline or dismissal of the person or employee affected. If the appointing officer fails to carry out the instructions of the Commission within 10 days after receipt thereof, the Commission shall certify the facts to the proper disbursing and auditing officers, and such officers shall make no payment or allowance of the salary or wages of any such person or employee thereafter accruing.

* * * * *

RULE XVI. REGULATIONS

1. **AUTHORITY TO MAKE REGULATIONS.**—The Commission shall have authority to make regulations for the execution of these rules.

4. EXECUTIVE ORDERS

EXECUTIVE ORDER No. 9063

AUTHORIZING THE CIVIL SERVICE COMMISSION TO ADOPT SPECIAL PROCEDURES RELATING TO RECRUITMENT, PLACEMENT, AND CHANGES IN STATUS OF PERSONNEL FOR THE FEDERAL SERVICE

Whereas millions of the citizens of this country are engaged in war industries or have been or expect to be called to duty with the armed forces of the United States, which militates against their competing for employment in the Federal service, and greatly diminishes the number of persons available for competitive positions in the Federal service; and

Whereas it is essential that there be no delay during the present emergency in filling positions in the Federal service with qualified persons;

Now, therefore, by virtue of the authority vested in me by section 2 of the Civil Service Act (22 Stat. 404), it is hereby ordered as follows:

1. The United States Civil Service Commission is authorized to adopt and prescribe such special procedures and regulations as it may determine to be necessary in connection with the recruitment, placement, and changes in status of personnel for

all departments, independent establishments, and other Federal agencies, except positions in the field service of the postal establishment. The procedures and regulations thus adopted and prescribed shall be binding with respect to all positions affected thereby which are subject to the provisions of the Civil Service Act and Rules.

2. Persons appointed solely by reason of any special procedures adopted under authority of this order to positions subject to the provisions of the Civil Service Act and Rules shall not thereby acquire a classified (competitive) civil-service status, but, in the discretion of the Civil Service Commission, may be retained for the duration of the war and for six months thereafter.

FRANKLIN D. ROOSEVELT

THE WHITE HOUSE,
February 16, 1942.

[F. R. Doc. 42-1417; Filed, February 17, 1942; 2:43 p. m.]
7 F. R. 1075, No. 35 (February 19, 1942)

EXECUTIVE ORDER No. 9067

PROVIDING FOR THE TRANSFER OF PERSONNEL TO WAR AGENCIES

By virtue of the authority vested in me by the Civil Service Act (22 Stat. 403), and by Section 1753 of the Revised Statutes of the United States (U. S. C., title 5, sec. 631), and in order to expedite the transfer of personnel to war agencies, it is hereby ordered as follows:

1. For the purpose of facilitating transfers of employees under the provisions of this Order, the Director of the Bureau of the Budget shall from time to time establish priority classifications of the several executive departments and agencies, or of parts or activities thereof, in respect to their relative importance to the war program, and such classifications shall be controlling as to transfers under the provisions of this Order.

2. The Civil Service Commission is authorized to secure information as to employees of executive departments and agencies who are deemed competent to perform essential war work in departments or agencies having a higher priority classification, and, with the consent of the employee concerned, to effect the transfer of any such employee to meet the personnel needs of a department or agency having a higher priority classification.

3. Whenever a transfer is proposed under the provisions of section 2, it shall become effective not later than 10 days after notification to the department or agency in which the employee

is serving. If, within that period, the employing department or agency presents to the Civil Service Commission evidence that its work will be jeopardized by the loss of the employee's services, the Civil Service Commission shall consider such evidence and make a final decision. Transfers to departments and agencies having the same or lower classifications, shall not be effected without the consent of the department or agency in which the employee is serving.

4. Any employee transferred pursuant to this Order shall be entitled to all the reemployment benefits provided by Executive Order No. 8973 (6 F. R. 6420) of December 12, 1941.

5. The Civil Service Commission is authorized to adopt such rules and regulations and to establish such procedures as may be necessary to carry out its responsibilities under this Order. Each Executive department and agency shall promptly furnish the Civil Service Commission such information regarding its employees as the Commission may require for the effectuation of this Order.

6. This Order shall supersede any provisions of Executive Order No. 8973 of December 12, 1941, or of any other Executive Order or Rule of the Civil Service Commission which is in conflict therewith.

FRANKLIN D. ROOSEVELT

THE WHITE HOUSE,

February 20, 1942.

[F. R. Doc. 42-1564; Filed, February 21, 1942; 12:51 p. m.]
7 F. R. 1407, No. 38 (February 25, 1942)

5. WAR SERVICE REGULATIONS

[Promulgated by Commission's departmental circular No. 323,
February 28, 1942]

* * * * *

Pursuant to the authority conferred by Executive Order 9063, of February 16, 1942, and 9067 of February 20, 1942, the United States Civil Service Commission hereby prescribes the following regulations to effectuate the purposes of those orders:

* * * * *

REGULATION II. QUALIFICATIONS OF APPLICANTS

* * * * *

SEC. 3. DISQUALIFICATIONS.—An applicant may be denied examination and an eligible may be denied appointment for any of the following reasons: (a) Dismissal from the service

for delinquency or misconduct; (b) physical or mental unfitness for the position for which he applies: *Provided*, that the physical requirements may be waived in the case of any person entitled to disability preference; (c) criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct; (d) intentional false statements as to any material fact, or deception or fraud in securing examination or appointment; (e) refusal to furnish testimony as required by Civil Service Rule XIV; (f) habitual use of intoxicating beverages to excess; (g) a reasonable doubt as to his loyalty to the Government of the United States; (h) any legal disqualification for appointment.

Any of the reasons stated in the foregoing subdivisions from (b) through (h) inclusive, shall also be sufficient cause for removal from the service.

* * * * *

REGULATION V. APPOINTMENT

* * * * *

SEC. 2. STATUS OF APPOINTEES.—Persons appointed under these regulations will not thereby acquire a classified (competitive) civil-service status. Unless otherwise specifically limited such appointments may be for the duration of the present war and for 6 months thereafter.

* * * * *

REGULATION VII. REMOVAL

SECTION 1. PROCEDURE IN REMOVALS.—The provisions of Civil Service Rule XII shall apply to all persons appointed under the provisions of these regulations except (a) those appointed for periods specifically limited to one year or less, (b) those serving the trial period provided for in section 3, Regulation V, and (c) those appointed subject to a condition imposed by the Commission which has not been complied with.

* * * * *

REGULATION IX. TRANSFER

* * * * *

SECTION 6. EXAMINATIONS.—No employee appointed without competitive or noncompetitive examination may be transferred without qualifying in such appropriate noncompetitive examinations as the Commission may prescribe, except em-

ployees who are subject to title I of the act of November 26, 1940, or any statute or Executive order providing for the acquisition of a classified civil service status. Whenever a transfer involves also a promotion or change in status, the provisions of these regulations regarding promotions and changes in status shall be applicable to such transfers.

* * * *

REGULATIONS XI. GENERAL PROVISIONS

SECTION 1. REGULATIONS SUPERSEDED.—The foregoing regulations shall supersede civil service rules III, V, VI, VII, VIII, IX, X, and all provisions of joint regulations inconsistent with these regulations, * * *

* * * *

APPENDIX B

The Commission, on the basis of its experience in handling thousands of these cases, has developed certain policy standards. It is of primary importance to record the fact that the Civil Service Commission will not consider charges against persons who are found merely to possess a progressive interest in seeking changes in the country's economic and political structure but who adhere firmly to the principle that such changes are only to be brought about through orderly democratic processes.

On the other side of the picture, there have evolved certain fairly well-defined categories, where, assuming adequate evidence, a negative conclusion follows. Typical of these latter categories are the following:

Persons who have advocated revolution or the use of force, if necessary, in order to bring about political or economic changes.

Persons whose association with organizations in agreement with the attitudes and policies of the Nazis, Fascists or Communists, has been such as to indicate sympathy with the programs of the Nazi, Fascists or Communists.

Persons who have expressed a desire to see the Axis nations emerge as the victor in the present conflict.

Persons whose record shows that they are more concerned with the success or failure of a foreign government or a foreign political system than with the welfare of the United States Government.

It is clear, of course, that tied up with the last point mentioned above is the whole question of Communism. In connection with the handling of these cases, the Commission has issued the following instructions to its staff:

THE COMMUNIST PARTY LINE

A good definition of a communist is "one who has followed the Communist Party line through one or more changes." The Communist Party line is the policy advocated by the various factions of the Komintern.

It is the policy of preserving and protecting the Soviet Union by whatever means are determined by its leaders.

It is not of great importance that the "line" during the first ten years of the existence of the Communist Party be intimately known. It is, however, imperative that any person investigating communist activity should know the last three major line changes. These are set forth below.

REVOLUTIONARY PERIOD, 1929 TO DECEMBER 1934

On May 6, 1929, a Communist Party spokesman said: "I think the moment is not far off when a revolutionary crisis will develop in America." From that time on all communist activity in this country was actively directed toward violent overthrow of this government. The literature of the party constantly promised the members that the day of reckoning had arrived; "that the shackles of capitalism were to be thrown off and that the decadent capitalist government was to be replaced by a proletarian dictatorship." In order to reduce the masses to the depth of despair necessary to reduce their resistance to armed revolution, it was essential, in the opinion of the communists, that the capitalist government refrain from any social changes which might "drug the masses into continued acceptance of the capitalistic system." For this reason the communists sought to wreck and destroy attempts by the New Deal to pass social legislation. Any person daring to advance such legislation was violently hated by them and branded with the term of contempt "Social Fascist." They included in this category President Roosevelt and the New Deal, John L. Lewis, Norman Thomas and his socialist party, and most liberals. They harassed the socialist party in its attempt to set up social security and unemployed workers' benefits organizations, and generally attempted to keep the United States in economic chaos. It must be remembered that this period included the worst years of the depression.

COLLECTIVE SECURITY PERIOD, DECEMBER 1934 TO AUGUST 1939

In December 1934, Earl Browder returned from a trip to Russia and immediately called a halt to the revolutionary program, and at the same time launched

the most effective period of communist infiltration in this country. This was the "Popular Front" period. The party made a complete about face. They ceased to apply the term "Social Fascist" to such persons as President Roosevelt, Thomas, and Lewis. They adopted the heroes of the American Revolution as forerunners of American Communism. The picture of Abraham Lincoln took its place beside that of Stalin. Where they had previously attacked attempts at social reform they now created a multiplicity of "Front" organizations to further such causes. Where they had previously chosen to ignore the rise of Fascism in Germany, they now bitterly attacked Hitler and called for a "United Front" of the great democracies, Soviet Russia, Great Britain, China, and the United States to stop the "Mad Dog" of Europe. The "Daily Worker" demanded punitive action against Japan and boycotting of other Axis countries. Where they had previously expressed nothing but hatred toward liberals and other radicals, they now courted these persons assiduously even to the extent of giving a testimonial dinner for Norman Thomas, the arch foe of communism in the years gone by.

COMMUNIST-NAZI PERIOD, AUGUST 1939 TO JUNE 1941

In August 1939, Russia signed a nonaggression Pact with Germany and the Communist Party line made a complete about face. Immediately all preparations for defense were termed by the communists as war mongering. The British war effort was reviled in the columns of the "Daily Worker" as an imperialistic war for the perpetuation of capitalist rule.

Communists, through their stooges in the "Party Front" organization, violently opposed such defense measures as the conscription bill and the Lend-Lease Bill and extensions of the Monroe Doctrine to the Western Hemisphere as a whole. The Communists allied themselves with other radical "peace" groups in an attempt to keep America from defending itself and from fighting against Hitler. They spread anti-"Yankee Imperialist" propaganda throughout South America in an effort to divide the Americas. President Roosevelt was denounced as a war monger. His defense program was termed an effort to drag the American people into an imperialistic war. All of the familiar and time-worn anti-war arguments were adopted by the communists.

In the youth faction the expression, "The Yanks are not coming" became extremely popular. Their war cry became, "No A. E. F., no convoys." While the communists in America did not openly support Adolph Hitler and the Axis, they revived every device for drawing attention away from the injustice perpetrated by that regime. American communists and fellow travelers sided with Russia in the war with Finland.

COLLECTIVE SECURITY PERIOD (REVIVED), JUNE 22, 1941,
TO DATE

With the attack of Russia by Germany on this date, the Communist Party line over night reverted again to the collective security phase. Communists began to vie with patriotic Americans in purchasing defense bonds and volunteering for civilian defense duties. The slogan, "The Yanks are not coming," was changed over night to "Stop Hitler Now," and "The Yanks are not coming too late." This is perhaps the most difficult period in which to detect an American communist.

An earmark of an American communist today is an advanced degree of patriotism. It is, therefore, difficult to distinguish friend from foe, but it must be remembered that this cloak of patriotism was not donned until June 23, 1941. However, it must also be remembered that many loyal Americans were sincerely isolationist in viewpoint until the necessity of our participation in the War become increasingly evident. The Communist will try to lead one to think that he is of that category. The fact which gives him away is the suddenness of his switch.

It must be made clear that to identify one as a Communist or a Fellow Traveler (or a sympathizer), it will be necessary to show a following of the above line through one or more changes. Many liberals were taken in by the Communists in the first collective security period but became aware of the true situation with the change in line occasioned by the signing of the Communazi Pact in August, 1939.

APPENDIX C

On May 25, 1942, Mr. Elmer Davis, then Director of the Office of War Information, in a radio broadcast over the Columbia Broadcasting System network, outlined the so-called "Communist Party Line Test." The pertinent portions of Mr. Davis' broadcast follow:

Now, fortunately, there is a very sure and simple test available to determine whether a man is a Communist or not * * * that is his behavior between August 21, 1939, when the German-Russian Treaty was signed, and June 21, 1941, when Germany attacked Russia, his behavior in that period as contrasted with his behavior before and after.

In the middle thirties, the Russian Government favored the policy of collective security * * * of everybody getting together to keep Hitler in check. After the Munich deal in 1938, the Russians lost faith in both the integrity and the intelligence of the Chamberlain and Daladier governments and eventually made a deal with Hitler, which lasted till he double-crossed them. The Communist Party line then was collective security, up till August 1939. After that * * * after the twenty-first of August, American Communists were neutral in what they called an imperialistic war, neutral and a somewhat pro-German flavour usually, and isolationist in their attitude toward American policy. That was the period when their slogan was, "The Yanks Are Not Coming." When Germany attacked Russia, they became overnight the most vigorous of interventionists and changed the slogan to, "The Yanks Are Not Coming Too Late."

There is your simple test of a Communist. Now this of course is not to say that everybody who was an isolationist up to June 21st of last year is a Communist. Isolationism was a policy which many Americans advocated for other reasons, and the Communists advocated for reasons of their own. But if he was an isolationist up to the night of June 21st and became an interventionist on June 22nd, then you can put your finger on him. It would be just as foolish, of course, to say that everybody who was in favor of collective security during the 1930's was a Communist. But if he was for collective security up till August 21st, 1939, and then suddenly switched over to isolationism, again you can put your finger on him.

JOINT APPENDIX

United States Court of Appeals FOR THE DISTRICT OF COLUMBIA

No. 9305

MORTON FRIEDMAN,

Appellant,

v.

LEWIS B. SCHWELLENBACH, et al.,

Appellees.

Appeal from Order of the District Court for the
District of Columbia

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New York, N. Y.

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United States Court of Appeals
for the District of Columbia

ED AUG 30 1946

Joseph Whitcomb
CLERK

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Complaint.

1

This is an action for a declaratory judgment, mandamus, injunction and further relief as stated in the prayer therefor.

Comes now the plaintiff, Morton Friedman, and brings this civil action against the above-named defendants, and for his Complaint respectfully alleges as follows:

1. The grounds upon which the jurisdiction of this Court depends is that the action arises under the Constitution and the Laws of the United States, to wit, the First and Fifth Amendments to the Constitution of the United States, the Act of January 16, 1883, 22 Stat. 403, 5 U. S. C. 1940 Ed., Section 632 et seq. (hereinafter referred to as the Civil Service Act), the Act of August 24, 1912, 37 Stat. 555, 5 U. S. C. 1940 Ed., Section 652 (hereinafter referred to as the Lloyd-LaFollette Act), the act of August 2, 1939, 53 Stat. 1147, 18 U. S. C. (1940 Ed.), Section 61, as amended (hereinafter referred to as the Hatch Act), Executive Order No. 8587, Nov. 7, 1940, and Section 11-306 of the District of Columbia Code and 28 U. S. C. 400.

2

2. Plaintiff is a natural-born citizen of the United States, and a resident of the State of New York. He is thirty-four years of age.

3. The defendant, McNutt, is an individual found doing business and resident in the District of Columbia, with offices at 4th Street and Independence Avenue, S. W., in the District of Columbia, and is Chairman of the War Manpower Commission, an agency established under Executive Order No. 9139, April 18, 1942, which Executive Order vests the administrative responsibility for such agency in the Chairman thereof. The said defendant is sued individually and as Chairman of the War Manpower Commission. Defendants Mitchell, McMillin and Flem-

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Complaint.

ming are individuals found doing business and resident in the District of Columbia, with offices at 7th and F Streets, N. W. in the District of Columbia, and are the members of the United States Civil Service Commission, an agency established under the Civil Service Act. The said defendants are sued individually and as members of the Civil Service Commission.

4. For a period of almost nine years, beginning with October 21, 1935, and ending with September 12, 1944, the plaintiff had been employed in Washington, D. C. with various agencies of the United States Government in different capacities, to wit:

<i>Agency</i>	<i>Dates Employed</i>	<i>Job Titles</i>	<i>Salary at start and at end</i>
Federal Works Agency (formerly Works Progress Administration, and then Work Projects Administration)	Oct. 21, '35	Research Assistant	\$2,000—
	to	Senior Editorial Clerk	3,200
	May 28, '42	Senior Investigating Asst.	
		Investigator	
Office for Emergency Management — Central Administrative Service	May 29, '42	Principal Position Classification	\$3,800—
	to	Analyst	4,600
	Apr. 17, '43	Head Position Classification Analyst	
War Manpower Commission	Apr. 18, '43 to Sept. 12, '44	Chief of the Classification Division	\$4,600

Complaint.

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5. In all of his services with the agencies set forth above, the quality of the plaintiff's work had been consistently high. His efficiency ratings, during such periods as he had been subject to such ratings, were at all times at least "very good" or "excellent"—the two highest possible ratings in the efficiency rating system. These ratings are a matter of record in the personnel files of the various agencies by which the plaintiff was employed.

6. As the work history set forth above indicates, plaintiff had steadily, throughout his nine years of employment with the Federal Government, been given increasing responsibilities and concomitant salary. All of the plaintiff's promotions were received solely on the basis of his merit as an employee of the United States Government, and in this manner, he had steadily progressed within the career system for employees of the Federal Government.

8

7. The position held by the plaintiff immediately prior to September 12, 1944, and since April 18, 1943, was that of Chief of the Classification Division of the War Manpower Commission, with a base rate of compensation of \$4,600 per annum. In the said position, he was responsible for assuring that the classifications of some 3,000 employees of the War Manpower Commission were properly allocated under the Classification Act of 1923 (42 Stat. 1488, 5 U. S. C. 1940 ed., 661 et seq.), and amendments thereto, and that the classifications of an additional group of employees of the War Manpower Commission, numbering approximately 20,000, were properly allocated under the relevant salary classification acts of each of the states in which offices of the War Manpower Commission were located. In the performance of his duties, the plaintiff had the assistance of as many as eleven technical analysts subordinate to him, and a clerical staff.

9

8. The plaintiff's supervisor in the position he held immediately prior to September 12, 1944, the Director of Personnel of the War Manpower Commission, believed that the plaintiff's services had uniformly been of a high order, and acting on behalf of the defendant, McNutt, had sought, as will more fully appear hereinafter, to retain the plaintiff in his position so that he might continue performing his duties.

11 9. Effective as of September 12, 1944, the plaintiff was separated from the services of the War Manpower Commission by the defendant, McNutt, acting through his Director of Personnel. The notice of separation, a copy of which is annexed hereto and made a part hereof as Exhibit A, and a letter from the Director of Personnel, a copy of which is annexed hereto and made a part hereof as Exhibit B, stated that the separation was based upon a declaration by the Civil Service Commission that the plaintiff was ineligible to hold his office. The letter from the Director of Personnel specifically eliminated as a cause for dismissal the quality of the plaintiff's work, and affirmed that the plaintiff's work was uniformly of a high order.

12 10. By separate letter of August 16, 1944, a copy of which is annexed hereto and made a part hereof as Exhibit C, the defendants, Mitchell, McMillin and Flemming, acting as the United States Civil Service Commission, cancelled any and all pending applications and existing eligibilities of the plaintiff.

11. The aforementioned actions of the defendant, McNutt, and of the defendants, Mitchell, McMillin and Flemming, were unlawful, capricious, without official authority and in violation of the plaintiff's constitutional and statutory rights, and were the culmination of the following events:

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In or about October, 1942, while the plaintiff was employed by the Office for Emergency Management, defendants, Mitchell, McMillin and Flemming, acting as the Civil Service Commission, sought the dismissal of the plaintiff from the said office. The said Commission, notwithstanding it had no authority to do so, at that time directed the Office for Emergency Management to terminate the plaintiff's employment, on the basis of an alleged investigation, as a result of which the said Commission considered the plaintiff ineligible to hold office. The Office for Emergency Management reviewed the charges made by the Civil Service Commission, and the findings which resulted from an extensive investigation conducted by the investigating division of the Office for Emergency Management. The said Office, through duly authorized officials thereof, concluded that the facts found by the Civil Service Commission could not justify a dismissal of the plaintiff, and furthermore, the said officials determined that it would be to the best interests of the Government to retain the plaintiff in the employ of the Office for Emergency Management. However, acting upon the erroneous belief that the Civil Service Commission had the authority to direct the termination hereinabove referred to, the Office for Emergency Management appealed the matter jointly with the plaintiff to the Board of Appeals and Review of the Civil Service Commission (the said Board of Appeals and Review being a body subordinate to the Civil Service Commission and having no authority to overrule the Commission). Without objection by the Civil Service Commission, the Office for Emergency Management retained the plaintiff in its employ pending the aforementioned appeal.

14

15

The Civil Service Commission in or about May, 1943, reasserted its direction to dismiss the plaintiff to the War Manpower Commission, to which agency the plaintiff had in the meantime been transferred as a result of re-organi-

zation. Plaintiff performed substantially the same personnel services for the War Manpower Commission before and after his transfer from the Office for Emergency Management. Prior to April, 1943, the said functions were centralized in the Office for Emergency Management; thereafter, the War Manpower Commission as a result of a reorganization, pursuant to Executive Order No. 9330, April 16, 1943, assumed these functions itself.

17 The War Manpower Commission, acting independently from previous action taken by the Office for Emergency Management, referred the direction of the Civil Service Commission to a special committee of responsible officials established by the War Manpower Commission, for the purpose of considering cases such as that involving the plaintiff, and including as one of its members, its General Counsel. The Civil Service Commission did not object to the retention of the plaintiff in the employ of the War Manpower Commission pending the review of this case by the aforementioned special committee of the War Manpower Commission. The said special committee concluded that the facts found by the Civil Service Commission could not justify a dismissal of the plaintiff, and furthermore, the duly authorized officials of the War Manpower Commission determined that it would be to the best interests of the Government to retain the plaintiff in the employ of the War Manpower Commission. However, acting upon the erroneous belief that the Civil Service Commission had
18 the authority to direct the termination hereinabove referred to, the War Manpower Commission requested the Civil Service Commission to reconsider its action. After many conferences between duly authorized officials of the War Manpower Commission and officials of the Civil Service Commission, the War Manpower Commission, acting through its duly authorized Personnel Director, finally joined the plaintiff in a personal appearance before the

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defendants, Mitchell, McMillin and Flemming on April 19, 1944, in an effort to cause a change in the attitude of the Civil Service Commission.

Notwithstanding the repeated requests of two Government agencies over a period of more than one and one-half years, the Civil Service Commission persisted in its view and directed the War Manpower Commission to terminate the plaintiff. The War Manpower Commission terminated the plaintiff's services solely because of the Civil Service Commission's direction and its erroneous view that the Civil Service Commission had the authority to force such a termination.

12. The reasons given by the defendants, Mitchell, McMillin and Flemming, acting as the Civil Service Commission for their actions against the plaintiff are contained in a letter dated June 5, 1944, the full text of which is as follows:

20

UNITED STATES CIVIL SERVICE COMMISSION
Washington, D. C.

File BAR: JFE: GD
June 5, 1944

Mr. Morton Friedman
c/o Personnel Office
War Manpower Commission
Washington, D. C.

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My dear Mr. Friedman:

Reference is made to your appearance before the Commission on April 19, 1944, in further prosecution of your appeal from the finding of ineligibility for continuance in the service.

The Commission has given most careful consideration to your case including the information developed during the course of the investigations which were made and the testimony before the Board of Appeals and Review at the hearing which was accorded you. Particular attention, however, has been given to your statements and based upon those statements the Commission has concluded that the finding of ineligibility was in accordance with the standards applied in such cases and therefore has affirmed the previous action.

23

The Commission's action was based mainly on your activities in connection with the American Peace Mobilization and your shift in attitude and point of view following the declaration of war between Germany and Russia. It may be true that many members of the American Peace Mobilization were not aware that it was Communist-dominated and pro-Communist but it is generally recognized that those who were prominently and actively affiliated with that organization were people who over a period of time had shown sympathy with the Communist cause. Your testimony was that you were sent to the first meeting of the American Peace Mobilization in Chicago as a representative of your local union; that you also were sent to a meeting of the organization in New York City as a delegate, and that you participated actively in their meetings and affairs. You also testified that you were active in the affairs of the Washington Peace Mobilization and served on several of its committees.

24

You were admittedly opposed to the United States participation in war before the invasion of Russia by Germany but thereafter you changed your mind and were of the opinion that this country should fight along with the other United Nations. Just how long it was before Pearl Harbor that you changed your mind is not definitely established, but on the occasion of your appearance before the Com-

Complaint.

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mission you indicated that it was probably in August of 1941, which obviously was soon after June 22, 1941.

These matters, together with other activities which have been personally discussed with you, are convincing to the Commission that you are not eligible for retention in the service according to the standards observed by the Commission.

By direction of the Commission:

Very respectfully,

s/ WM. C. HULL
Executive Assistant

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13. Plaintiff agrees that the facts stated in the third and fourth paragraphs of the above letter are correct insofar only as they refer to his own activities and his own opinions but does not agree to the characterization of his acts and opinions or of the organization in which he was interested. Referring to the last paragraph of the above letter, plaintiff, after reviewing all the discussions he has ever had with the Commission, has no knowledge of what the Commission could possibly be intending or suggesting by the reference to "other activities which have been personally discussed with you." Plaintiff states that the American Peace Mobilization was a national organization active during parts of 1940 and 1941, which expressed a point of view relating to an important political issue of the time, i.e. participation by this country in the war in Europe. In general, its position was opposed to such activities on the part of the Government which might have, at that time, brought the United States into the war. To the best of plaintiff's knowledge and belief, the said organization was not Communist-dominated or pro-Communist, and the plaintiff does not know by whom "it is generally recognized", other than by the Civil Service Commission "that

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those who were prominently and actively affiliated with that organization were people who over a period of time had shown sympathy with the Communist cause." Indeed, the said organization claimed to have the support of some 14,000,000 persons in the United States and the plaintiff verily believes that its point of view did in fact represent the opinions of a substantial segment of the population of the United States. The said organization, to the best of the plaintiff's knowledge and belief, has never been declared to be unlawful or illegal.

14. Plaintiff does not find it necessary to argue now as to the correctness of his opinions prior to December 7, 1941, respecting the war, or the correctness of the point of view expressed by the aforementioned organization. Indeed, plaintiff cannot now say whether, had he been able then accurately to predict the course of events in the following years, he would have held the same opinions or been affiliated with the same organization. Plaintiff asserts, however, that as a Federal employee he had a right to hold and express an opinion as to the political issues of the day, whether or not his opinions were wise or correct; that he was not called upon by any law accurately to prognosticate the future, and particularly that he was not required at his peril to hold such opinions on political issues as the United States Civil Service Commission considers to be orthodox.

15. Plaintiff also states that at the hearing held in January, 1943, before the Board of Appeals and Review above referred to, while no testimony or evidence was presented against the plaintiff (the case against him being based entirely upon an investigator's report, never read or shown to the plaintiff but kept in the secret files of the Civil Service Commission, and, like all such reports, consisting en-

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tirely of alleged statements of anonymous and unsworn witnesses), the plaintiff presented extensive testimony of witnesses under oath and subject to cross-examination. The said witnesses were chiefly responsible officials of the United States Government; most of them were high-ranking personnel officers, whose official duties required them to be fully familiar with standards of suitability for Federal employment. The said officials testifying with respect to their knowledge of plaintiff's conduct over a period of years all affirmed that he was a loyal, devoted and exceptionally valuable public servant; that whatever opinions he may have had, and they were aware of his opinions, they were the opinions of an independent loyal American citizen, exercising his right and his duty to think and express himself about the political issues of the day. The stenographic transcript of this proceeding is in the confidential files of the Civil Service Commission.

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16. The Civil Service Act, in Section 2 thereof, provides as follows:

"That it shall be the duty of said Commissioners (Civil Service Commissioners):

"First: To aid the President, as he may request, in preparing suitable rules for carrying this Act into effect, and when said rules shall have been promulgated it shall be the duty of all officers of the United States in the departments and offices to which any such rules may relate, to aid, in all proper ways, in carrying said rules and any modifications thereof into effect.

33

"Second: And among other things, the said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:

* * * * *

"Fifth: That no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so.

"Sixth: That no person in said service has any right to use his official authority or influence to coerce the political action of any person or body."

- 35 17. Pursuant to the said statutory provisions, the President of the United States has formulated (Executive Order No. 8587, November 7, 1940), as Civil Service Rule 1, Section 2, the following:

36 "No question in any form of application or in any examination shall be so framed as to elicit information concerning the political or religious opinions or affiliations of any applicant, nor shall any inquiry be made concerning such opinions or affiliations, and all disclosures thereof shall be discountenanced, except as to such membership in political parties or organizations as constitutes by law a disqualification for Government employment. No discrimination shall be exercised, threatened, or promised by any person in the executive civil service against or in favor of any applicant, eligible, or employee in the classified service because of race, or his political or religious opinions or affiliations, except as may be authorized or required by law."

18. The Hatch Act, in Section 9(a) thereof, provides as follows:

"All such persons (officers or employees in the executive branch of the Federal Government, or any agency or department thereof) shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates."

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19. The defendants, Mitchell, McMillin and Flemming, as stated in their letter of June 5, 1944, have declared the plaintiff ineligible for employment with the Federal Government because:

- (a) he participated in an organization which expressed a point of view respecting the political issue of the participation of this country in the war before December 7, 1941, and
- (b) between June and August, 1941, he underwent certain changes in his opinions respecting the participation of the United States in the war.

In so declaring the plaintiff ineligible, the said defendants, and in acting upon such declaration, the defendant McNutt, have unlawfully discriminated against the plaintiff because of his political opinions and affiliations in a manner repugnant to the First and Fifth Amendments to the Constitution of the United States and in violation of the Civil Service Act, Rule 1 of the Civil Service Rules and the Hatch Act.

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20. The plaintiff has not violated any of the provisions of the Hatch Act and is not charged with any such violation. Plaintiff's continued employment by the War Manpower Commission would not be in contravention of the provisions of any appropriation act of Congress and no such contravention is charged.

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21. Nothing in any law of Congress authorizes or requires the dismissal of the plaintiff for the reasons set forth in the above-referred to letter of June 5, 1944.

22. The defendant McNutt, in effecting the termination of the plaintiff, did not exercise his own discretion as he would in terminating an employee to promote the efficiency

of the service. As set forth above, he acted solely upon the erroneous belief that notwithstanding his own desires to retain the plaintiff in the employ of the War Manpower Commission, he was bound by a declaration of ineligibility made by the defendants Mitchell, McMillin and Flemming, acting as the Civil Service Commission. The notice of termination from the War Manpower Commission and the letter from the Director of Personnel of the said Commission stated no other grounds for separation of the plaintiff.

23. The Lloyd-LaFollette Act provides for the procedure for the dismissal of federal employees as follows:

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"No person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal, and of the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Civil Service Commission also shall, upon request, be furnished copies of same."

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24. Under the said Act, it was the responsibility of the defendant McNutt, as the administrative head of the agency by which the plaintiff was employed, and not the responsibility of the defendants Mitchell, McMillin and

Complaint.

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Flemming, to determine whether there existed proper cause for the removal of the plaintiff.

25. The defendant McNutt, in failing to exercise his own discretion as to whether there existed proper cause for the removal of the plaintiff, and the defendants, Mitchell, McMillin and Flemming, in claiming their right to declare the plaintiff ineligible to continue to hold a position after he has been appointed to such position, acted unlawfully and in violation of the Lloyd-LaFollette Act.

26. The plaintiff, through the above unlawful acts of the defendants, is suffering substantial injury which can only be remedied by his reinstatement in the federal service.

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27. The plaintiff has exhausted all remedies before any and all administrative agencies of the United States which might have jurisdiction in this matter.

28. There exists no other adequate remedy at law by which the plaintiff may protect the rights of which he is being deprived.

WHEREFORE, the plaintiff prays:

1. That the Court render a declaratory judgment that

A. The plaintiff was improperly dismissed from his position with the War Manpower Commission and is entitled to reinstatement;

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B. The grounds upon which the plaintiff's dismissal were based were improper and in violation of the First and Fifth Amendments to the Constitution of the United States, the Civil Service Act, the Hatch Act and of Civil Service Rule 1;

C. The Civil Service Commission had no authority to require the dismissal of the plaintiff, and that the War

Complaint.

Manpower Commission was required to exercise its own discretion in determining whether there existed proper cause for the removal of the plaintiff.

2. That the Court order and direct the defendant, McNutt, as Chairman of the War Manpower Commission, to reinstate the plaintiff.

3. That the Court grant an injunction enjoining the defendants Mitchell, McMillin and Flemming, as members of the United States Civil Service Commission, from interfering in any way with the plaintiff's reinstatement with the War Manpower Commission or his employment in any other position, for which he is eligible, with any other agency of the United States Government.

4. That the Court order and direct the defendants Mitchell, McMillin and Flemming to withdraw their cancellation of pending applications and existing eligibilities of the plaintiff and restore his status as an applicant, and/or eligible for any of the examinations which were affected by the Civil Service Commission's cancellation of August 16, 1944.

5. That the Court grant plaintiff such other and further relief as may be just and equitable in the premise.

6. That the defendants pay the costs of this action.

s/ MORTON FRIEDMAN,
Morton Friedman,
Plaintiff.

MORTON STAVIS,
Attorney for the Plaintiff,
270 Broadway,
New York 7, N. Y.

SIDNEY V. SMITH,
Associate Local Counsel,
1119 Barr Building,
Washington 6, D. C.

(Verification dated December 24, 1944, omitted.)

Exhibit A to Complaint.**WAR MANPOWER COMMISSION****ADVICE OF PERSONNEL ACTION**

Date This Advice—June 12, 1944.

To: Friedman, Morton.

This notifies you of the following action with regard to your employment. If you have any questions concerning this action please take them up with the personnel office.

Nature of Action—Separation (Disqualification).

Effective Date—September 12, 1944 at 11:45 am.

Position—Head Classification Analyst CAF-12.

Grade and Salary—CAF-12, \$4600 p.a.

Office—War Manpower Commission.

Division—Personnel Service Classification.

Headquarters—Washington, D. C.

Departmental or Field—Departmental.

Date of Birth—Nov. 30, 1910.

Legal Residence—New York.

Sex—M.

Remarks: (pay for 2 hrs) Found to be ineligible by Civil Service Commission (letter of June 5, 1944).

Appointments to positions are made for such period of time as the work is required and funds are available. New appointments are subject to character investigation. This document may not be used as a basis for the assertion of any authority or for a claim of any privileges as a representative of the Government.

R. M. BARNETT
WMC 4

Director of Personnel
cbc

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Exhibit B to Complaint.**OFFICE FOR EMERGENCY MANAGEMENT
WAR MANPOWER COMMISSION**

Washington, D. C.

Chairman
Paul V. McNutt
Federal Security Administration

July 25, 1944

Mr. Morton Friedman
33-43 166th Street
53 Flushing, Long Island

Dear Morton:

This note is to confirm what I have told you orally. Your services with the War Manpower Commission were terminated at the request of the United States Civil Service Commission in a letter dated June 5, 1944.

You will recall that your appointment with us was subject to investigation of the Civil Service Commission. As a result of their investigation they have declared you ineligible for continuation in our employ.

This termination of your services is not in any way based upon the work you did for us which, as I have told you, was uniformly of a high order.

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Sincerely yours,

s/ R. M. BARNETT
R. M. BARNETT
Director of Personnel

Exhibit C to Complaint.**UNITED STATES CIVIL SERVICE COMMISSION****WASHINGTON, D. C. 28****August 16, 1944**

**Mr. Morton Friedman
100 Cameron Road
Falls Church, Virginia**

The Commission informs you that your applications and/or eligibilities for each of the examinations listed below have been canceled as of February 18, 1944, because of information disclosed through investigation which indicates that you do not measure up to the standard of general suitability and fitness maintained for Government employment.

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UNITED STATES CIVIL SERVICE COMMISSION

Examination: Any and all pending applications and existing eligibilities.

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Motion to Dismiss Complaint.

(Filed March 27, 1945.)

The defendants, Paul V. McNutt, individually and as Chairman of the War Manpower Commission, and Harry R. Mitchell, Lucille Foster McMillin and Arthur S. Fleming, individually and as members of the Civil Service Commission, by their attorneys, Francis M. Shea, Assistant Attorney General, and Edward M. Curran, United States Attorney for the District of Columbia, respectfully move this Court to dismiss the complaint in the above-entitled action upon the following grounds:

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1. The Court lacks jurisdiction over the subject matter of the action; and
2. The complaint fails to state a claim against the defendants upon which relief can be granted.

S/ FRANCIS M. SHEA
Francis M. Shea,
Assistant Attorney General,

S/ EDWARD M. CURRAN
Edward M. Curran,
United States Attorney,
Attorneys for Defendants.

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Opinion and Order on Motion to Dismiss Complaint.

The Motion to Dismiss is taken with the case and action on said Motion deferred for the following reasons—

While the courts should not control or undertake to control the exercise of the discretionary power of the Civil Service Commission in the exercise of the duties imposed upon that Commission by Congress, yet the complaint charges, among other things, the capricious dismissal of Plaintiff. This latter charge necessarily implies that the action of the Commission was entirely unsupported by any proper evidentiary or statutory basis. The statutory basis which is asserted by the Commission as authorizing the action complained of is of course definitely fixed by the Acts of Congress and hence the determination of the evidence or non-evidence of the authority of the Commission to act is a question of law which could with definiteness be determined on the present motion. But the questions of fact relative to the question of whether the action of the Commission was based upon any proper factual premise are not stipulated and do not appear with sufficient definiteness to justify the determination of the cause upon the present record.

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s/ J. C. COLLET,
U. S. District Judge.

Dated at Washington, D. C., this 9th day of June, 1945.

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Answer.

For answer to the complaint herein the defendants state:

1. Defendants deny the allegations contained in Paragraphs 1, 11, 13, 19, 21, 24, 25, 26, and 28 of the complaint.
2. Defendants admit the allegations in Paragraphs 2, 3, 4, 7, 9, 10, 16, 17, 18, and 27 of the complaint.
3. Defendants allege they have no knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of Paragraph 5 of the complaint; they admit the allegations contained in the last
65 two sentences of said Paragraph 5 of the complaint.
4. Defendants deny the allegations in Paragraph 6 of the complaint except that they admit that plaintiff has been given increased responsibilities and salaries while in the employ of the Federal Government.
5. Defendants allege they have no knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 8 of the complaint.
6. Defendants deny the allegations contained in Paragraph 12 of the complaint except that they admit that a letter was sent by the United States Civil Service Commission to the plaintiff on June 5, 1944 and the text of the
66 letter is as set forth in said Paragraph 12 of the complaint.
7. Defendants state that the matters contained in Paragraph 14 of the complaint are argumentative or conclusions of law and require no answer.
8. Defendants deny the allegations contained in Paragraph 15 of the complaint except that they admit that a

Answer.

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hearing was held as referred to in said allegation and that some persons testifying at said hearing testified that the plaintiff was loyal.

9. Defendants deny the allegations in Paragraph 20 of the complaint except that they admit that the plaintiff was not charged with having violated any of the provisions of the Hatch Act.

10. Defendants deny the allegations in Paragraph 22 of the complaint except that they admit that a letter of termination sent by defendant McNutt to plaintiff stated that the ground for the termination of his employment was the declaration of ineligibility made by the Civil Service Commission.

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11. Defendants deny that the Lloyd-Lafollette Act provides the procedure for the dismissal of Federal employees other than those in the classified civil service of the United States; defendants admit the remainder of Paragraph 23.

FOR A FIRST AFFIRMATIVE DEFENSE

12. The complaint fails to state a claim upon which relief can be granted.

FOR A SECOND AFFIRMATIVE DEFENSE

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13. On February 16, 1942, the President by Executive Order Number 9063 (7 F. R. 1075) authorized the Civil Service Commission to adopt special procedures relating to recruitment, placement, and changes in status of personnel in Federal service in order that there would be no delay during the war emergency in filling positions in the Federal service with qualified persons.

14. The President on February 20, 1942, by Executive Order Number 9067 (7 F. R. 1407) further authorized the Civil Service Commission to secure information as to employees of executive departments and agencies who were deemed competent to perform essential war work in departments or agencies having a higher priority classification, and, with the consent of the employees concerned, to effect the transfer of any such employee to meet the personnel needs of a department or agency having a higher priority classification, and to adopt rules and regulations necessary to carry out its responsibilities thereunder.

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Pursuant to Executive Orders 9063 and 9067, the Civil Service Commission adopted its War Service Regulations, effective March 16, 1942 (Title 5, CFR, Cum. Supp., Chapter 1, Part 18; 7 F. R. 7723).

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15. In order to expedite employment and transfers to meet war conditions, the Civil Service Commission expanded its use of conditional appointments and conditional transfers, a practice whereby the Commission effects an immediate employment or transfer, subject to a condition. The condition ordinarily imposed is that the person shall be subject to a character investigation for the purpose of ascertaining the qualifications determinable by such investigation. This procedure enables the Commission to fill a vacancy immediately and complete its examination of the applicant or transferee at a subsequent date. Prior to the war, the Commission's established policy was to publish an announcement of the examination, stating the type of position, required qualifications, place of examination, etc., hold an examination, conduct investigations, make a determination as to qualifications, fitness and suitability, establish a register setting forth those who are qualified and their respective numerical ratings, and certify three names from the top of the register to the agency. To meet the necessity of rapid expansion of employment, the Com-

mission dispensed with this peace-time practice and resorted to the speedier method of filling vacancies by direct recruitment. Persons were placed on the job under a conditional appointment or conditional transfer, and thereafter the Commission conducted its investigation to ascertain certain factors of qualification before certifying as to the eligibility of the applicant or transferee. This method of appointment was expressly recognized by the War Service Regulations.

The conditional appointment method has been in limited use since 1934.

16. The plaintiff's transfer on May 29, 1942 from the Federal Works Agency to the Division of Central Administrative Services, Office for Emergency Management, was made "subject to investigation".

17. War Service Regulation II, Section 3, provides in part as follows:

An applicant may be denied examination and an eligible may be denied appointment for any one of the following reasons:

* * * * *

(g) a reasonable doubt as to his loyalty to the Government of the United States;

(h) any legal disqualification for appointment.

Any of the reasons stated in the foregoing subdivisions from (b) through (h), inclusive, shall be sufficient cause for removal from the service.

These disqualifications are elements that come within the scope of an investigation and which usually are only discovered by investigation.

18. After a full investigation during the course of which plaintiff was given adequate notice and the opportunity to be heard and present witnesses on his behalf, and on the basis of sufficient evidence, the United States Civil Service Commission determined that there was a reasonable doubt as to plaintiff's loyalty to the Government of the United States.

19. On the basis of the aforesaid determination the United States Civil Service Commission declared that the plaintiff was disqualified from employment under the War Service Regulations and so advised the agency employing the plaintiff.

WHEREFORE, the defendants pray that the complaint be dismissed with costs.

s/ EDWARD M. CURRAN,
United States Attorney for the
District of Columbia.

s/ LAURENCE V. MELOY,
Attorney, Civil Service Commission.

Plaintiff's Motion for Summary Judgment Against the Defendants Under Rule 56.

The plaintiff respectfully moves the Court, pursuant to Rule 56 of the Rules of Civil Procedure, for summary judgment against the defendants for the relief demanded in the plaintiff's complaint and such other and further relief as to the Court may seem just and proper, for the following reasons:

The pleadings and proceedings herein and the plaintiff's affidavit hereto annexed, sworn to the 11th day of October, 1945, show that there is no genuine issue as to any material fact and that the plaintiff is entitled to judgment against the defendants as a matter of law.

Dated: Washington, D. C., October 16, 1945.

MORTON STAVIS,
Attorney for Plaintiff,
270 Broadway,
New York 7, New York.

SIDNEY V. SMITH,
Associate Counsel in the
District of Columbia,
Barr Building,
Washington 6, D. C.

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**Affidavit in Support of Plaintiff's Motion for
Summary Judgment.**

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MORTON FRIEDMAN, being duly sworn, deposes and says:

1. Deponent is the plaintiff in the above-entitled action.
2. This is an action for a judgment declaring that the deponent was unlawfully dismissed from his position with an executive agency of the United States Government, ordering his reinstatement thereto, and ordering the withdrawal of the cancellation of his applications and eligibilities for positions with the United States Government, and for other relief. Deponent refers to his verified complaint herein for a particular statement of his cause of action and his prayers for relief.
3. Deponent verily believes that there is no genuine issue as to any material fact set forth in his complaint herein and that he is entitled to judgment as a matter of law.
4. Deponent further alleges of his personal knowledge:
5. Deponent is a natural-born citizen of the United States, and a resident of the State of New York. He is thirty-four years of age.
6. The defendant McNutt is an individual and, at all times referred to herein, was found doing business and resident in the District of Columbia, with offices at 4th and Independence Avenue, S. W., in the District of Columbia, and was Chairman of the War Manpower Commission, an agency established under Executive Order No. 9139, April

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Affidavit in Support of Plaintiff's Motion.

18, 1942, which Executive Order vests the administrative responsibility for such agency in the Chairman thereof. Defendants Mitchell, McMillin and Flemming are individuals found doing business and resident in the District of Columbia, with offices at 7th and F Streets, N. W., in the District of Columbia, and are the members of the United States Civil Service Commission, an agency established under the Civil Service Act.

7. For a period of almost nine years, beginning with October 21, 1935, and ending with September 12, 1944, deponent had been employed in Washington, D. C. with various agencies of the United States Government in different capacities, to wit:

<i>Agency</i>	<i>Dates Employed</i>	<i>Job Titles</i>	<i>Salary at start and at end</i>
Federal Works Agency (formerly Works Progress Administration, and then Works Projects Administration)	Oct. 21, '35	Research Assistant	\$2,000—
	to	Senior Editorial Clerk	3,200
	May 28, '42	Senior Investigating Asst.	
		Investigator	
Office for Emergency Management — Central Administrative Service	May 29, '42	Principal Position Classification	\$3,800—
	to	Analyst	4,600
	Apr. 17, '43	Head Position Classification Analyst	
War Manpower Commission	Apr. 18, '43 to Sept. 12, '44	Chief of the Classification Division	\$4,600

8. The quality of the work of Government employees is periodically rated by their superior officers in so-called efficiency ratings. The efficiency ratings of deponent, during such periods as he had been subject to such ratings, were at all times at least "very good" or "excellent"—the two highest possible ratings in the efficiency rating system.

As the work history set forth above indicates, deponent had steadily, throughout this nine years of employment with the Federal Government, been given increasing responsibilities and concomitant salary.

9. The position held by deponent, immediately prior to September 12, 1944, and since April 18, 1943, was that of Chief of the Classification Division of the War Manpower Commission, with a base rate of compensation of \$4,600 per annum. In the said position, he was responsible for assuring that the classifications of some 3,000 employees of the War Manpower Commission were properly allocated under the Classification Act of 1923 (42 Stat. 1488, 5 U. S. C. 1940 ed., 661 et seq.), and amendments thereto, and that the classifications of an additional group of employees of the War Manpower Commission, numbering approximately 20,000, were properly allocated under the relevant salary classification acts of each of the states in which offices of the War Manpower Commission were located. In the performance of his duties, deponent had the assistance of as many as eleven technical analysts subordinate to him, and a clerical staff.

10. Deponent's supervisor in the position he held immediately prior to September 12, 1944, the Director of Personnel of the War Manpower Commission, believed that the plaintiff's services had uniformly been of a high order, and acting on behalf of the defendant, McNutt, had sought, as will more fully appear hereafter, to retain the plaintiff in his position so that he might continue performing his duties.

Affidavit in Support of Plaintiff's Motion.

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11. Effective as of September 12, 1944, deponent was separated from the services of the War Manpower Commission by the defendant, McNutt, acting through his Director of Personnel. The notice of separation, dated June 12, 1944, a copy of which is annexed hereto and made a part hereof as Exhibit A, and a letter from the Director of Personnel, dated July 25, 1944, a copy of which is annexed hereto and made a part hereof as Exhibit B, stated that the separation was based upon a declaration of the Civil Service Commission that the deponent was ineligible to hold his office. The letter from the Director of Personnel specifically eliminated as a cause for dismissal the quality of deponent's work, stating:

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"This termination of your services is not in any way based upon the work you did for us which, as I have told you, was uniformly of a high order."

12. By separate letter of August 16, 1944, a copy of which is annexed hereto and made a part hereof as Exhibit C, the defendants, Mitchell, McMillin and Flemming, acting as the United States Civil Service Commission, cancelled any and all of deponent's pending applications and existing eligibilities for Government employment.

13. The aforesaid actions of the defendant, McNutt, and of the defendants, Mitchell, McMillin and Flemming, were the culmination of the following events:

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14. In or about October, 1942, while deponent was employed by the Office for Emergency Management, defendants Mitchell, McMillin and Flemming, acting as the Civil Service Commission, directed the Office for Emergency Management to terminate the deponent's employment, on the basis of an alleged investigation, as a result of which the said Commission considered deponent ineligible to

hold office. The Office for Emergency Management reviewed the charges made by the Civil Service Commission, and the findings which resulted from an investigation conducted by the investigating division of the Office for Emergency Management. The said office, through duly authorized officials thereof, concluded that the facts found by the Civil Service Commission could not and did not justify a dismissal of deponent, and furthermore, the said officials determined that it would be to the best interests of the Government to retain deponent in the employ of the Office for Emergency Management. The Office for Emergency Management appealed the matter jointly with deponent to the Board of Appeals and Review of the Civil Service Commission (the said Board of Appeals and Review being a body subordinate to the Civil Service Commission and having no authority to overrule the Commission). Without objection by the Civil Service Commission, the Office for Emergency Management retained deponent in its employ pending the aforementioned appeal. The aforesaid Board of Appeals and Review of the Civil Service Commission found no ground for dismissing deponent from his position or for directing his dismissal.

15. The Civil Service Commission, however, in or about May, 1943, reasserted its direction to the War Manpower Commission to dismiss deponent. (Deponent had been transferred from the Office of Emergency Management to the War Manpower Commission as a result of the transfer of certain functions from the former to the latter agency in April, 1943, pursuant to Executive Order No. 9330, April 16, 1943. Deponent's duties and services were substantially similar both prior and subsequent to the said transfer.)

16. The War Manpower Commission, acting independently from previous action taken by the Office for Emer-

Affidavit in Support of Plaintiff's Motion.

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gency Management, referred the direction of the Civil Service Commission to a special committee of responsible officials established by the War Manpower Commission, for the purpose of considering cases such as that involving deponent, and including as one of its members, its General Counsel. The Civil Service Commission did not object to the retention of deponent in the employ of the War Manpower Commission pending the review of this case by the aforementioned special committee of the War Manpower Commission. The said special committee concluded that the facts found by the Civil Service Commission could not and did not justify deponent's dismissal, and furthermore, the duly authorized officials of the War Manpower Commission determined that it would be to the best interests of the Government to retain the deponent in the employ of the War Manpower Commission. The War Manpower Commission thereupon requested the Civil Service Commission to reconsider its action. After many conferences between duly authorized officials of the War Manpower Commission and officials of the Civil Service Commission, the War Manpower Commission, acting through Robert M. Barnett, its duly authorized Personnel Director, finally joined deponent in a personal appearance before the defendants Mitchell, McMillin and Flemming on April 19, 1944, in an effort to cause a change in the attitude of the Civil Service Commission.

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17. However, notwithstanding the repeated requests of the Office for Emergency Management and the War Manpower Commission over a period of more than one and one-half years, and notwithstanding the findings of its Board of Appeals and Review, the Civil Service Commission persisted in its view and directed the War Manpower Commission to terminate the services of deponent, and the War Manpower Commission thereupon, on September 12, 1944, terminated deponent's services.

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Affidavit in Support of Plaintiff's Motion.

18. In a letter to deponent, dated June 5, 1944, the Civil Service Commission gave reasons for their actions against deponent. The full text of this letter is as follows:

UNITED STATES CIVIL SERVICE COMMISSION
Washington, D. C.

File BAR:JFE:GD
June 5, 1944

Mr. Morton Friedman
c/o Personnel Office
War Manpower Commission
Washington, D. C.

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My dear Mr. Friedman:

Reference is made to your appearance before the Commission on April 19, 1944, in further prosecution of your appeal from the finding of ineligibility for continuance in the service.

The Commission has given most careful consideration to your case including the information developed during the course of the investigations which were made and the testimony before the Board of Appeals and Review at the hearing which was accorded you. Particular attention, however, has been given to your statements and based upon those statements the Commission has concluded that the finding of ineligibility was in accordance with the standards applied in such cases and therefore had affirmed the previous action.

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The Commission's action was based mainly on your activities in connection with the American Peace Mobilization and your shift in attitude and point of view following the declaration of war between Germany and Russia. It may be true that many members of the American Peace Mobilization were not aware that it was Communist-dominated and pro-Communist but it

Affidavit in Support of Plaintiff's Motion.

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is generally recognized that those who were prominently and actively affiliated with that organization were people who over a period of time have shown sympathy with the Communist cause. Your testimony was that you were sent to the first meeting of the American Peace Mobilization in Chicago as a representative of your local union; that you also were sent to a meeting of the organization in New York City as a delegate, and that you participated actively in their meetings and affairs. You also testified that you were active in the affairs of the Washington Peace Mobilization and served on several of its committees.

You were admittedly opposed to the United States participation in war before the invasion of Russia by Germany but thereafter you changed your mind and were of the opinion that this country should fight along with the other United Nations. Just how long it was before Pearl Harbor that you changed your mind is not definitely established, but on the occasion of your appearance before the Commission you indicated that it was probably in August of 1941, which obviously was soon after June 22, 1941.

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These matters, together with other activities which have been personally discussed with you, are convincing to the Commission that you are not eligible for retention in the service according to the standards observed by the Commission.

By direction of the Commission:

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Very respectfully,

s/ WM. C. HULL

Executive Assistant

19. Deponent agrees that the facts stated in the third and fourth paragraphs of the above letter are correct insofar only as they refer to his own activities and his own

opinions but does not agree to the characterization of his acts and opinions or of the organization in which he was interested. Referring to the last paragraph of the above letter, deponent, after reviewing all the discussions he has ever had with the Commission and its representatives, has no knowledge of what the Commission could possibly be intending or suggesting by the reference to "other activities which have been personally discussed with you".

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20. The American Peace Mobilization referred to in the aforesaid letter of the Civil Service Commission, in certain of whose activities deponent participated, was a national organization active during parts of 1940 and 1941, which expressed a point of view relating to an important political issue of the time, i.e. participation by this country in the war in Europe. In general, its position was opposed to such activities on the part of the Government which might have, at that time, brought the United States into the war. To the best of deponent's knowledge and belief, the said organization was not Communist-dominated or pro-Communist, and deponent does not know by whom "it is generally recognized", other than by the Civil Service Commission, "that those who were prominently and actively affiliated with that organization were people who over a period of time had shown sympathy with the Communist cause". Indeed the said organization claimed to have the support of some 14,000,000 persons in the United States and deponent verily believes that its point of view did in fact represent the opinions of a substantial segment of the population of the United States. The said organization, to the best of deponent's knowledge and belief, has never been declared to be unlawful or illegal.

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21. Without at present arguing the correctness of the opinions he held prior to the participation of the United States in the war, as to the propriety or justice of such

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participation or the correctness of the point of view expressed by the aforementioned organization, deponent asserts that as a Federal employee, he has a right to hold and express an opinion as to the political issues of the day, whether or not his opinions were wise or correct; that he was not called upon by any law accurately to prognosticate the future, and particularly that he was not required at his peril to hold such opinions on political issues as the Civil Service Commission considers to be orthodox.

22. At the hearing held in January, 1943, before the Civil Service Commission's Board of Appeals and Review above referred to, no witnesses appeared nor was any evidence presented against deponent. The case against him was based entirely upon an investigator's report, never read or shown to deponent, but which is kept in the secret files of the Civil Service Commission and consists entirely of alleged statements of anonymous and unsworn witnesses. At this hearing, the Chairman of the said Board of Appeals and Review stated on the record:

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"Incidentally, we have no more information than you do as to who the witnesses were, except in a very few isolated cases, and we don't know in some respects just how they came into possession of the information which they had given. It is not our investigation."

23. At the hearing aforesaid, deponent presented extensive testimony of witnesses under oath and subject to cross-examination. Among the witnesses appearing in his behalf were the following:

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Charles N. Mills, Director of Personnel, Office for
Emergency Management;
Richard W. Cooper, Chief of Personnel, War Man-
power Commission;
Lester L. Evans, Acting Director of Personnel, Fed-
eral Works Agency;

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Affidavit in Support of Plaintiff's Motion.

Major Fred Zappolo, formerly Director of Personnel, Works Projects Administration, and, at the time of hearing, engaged in personnel work in the Quartermaster Corps, U. S. Army;

Jay W. Murphy, formerly on the personnel staff of the Work Projects Administration and, at the time of the hearing, engaged in confidential work in the Navy Department;

George Hamson, Assistant Director of Personnel, Office for Emergency Management; and

John Ashman, Chief of Classification Division, Office for Emergency Management.

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The testimony of Messrs. Mills and Cooper on plaintiff's behalf was presented in their official capacities as representatives of their agencies.

In addition, letters were presented from two individuals who were absent from Washington on official business at the time of the hearing and were therefore unable to testify in person. These individuals were

Captain Arthur Schraeger, formerly on the personnel staff of the Works Projects Administration and at the time of his letter engaged in personnel work in the Quartermaster Corps; and

Elbert W. Smith, Assistant Director of Personnel, Farm Credit Administration.

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All the aforesaid witnesses and writers of letters on deponent's behalf were personally acquainted with deponent through their association with him in the personnel work of the War Manpower Commission or in his previous employments enumerated above. As their titles indicate, the said witnesses were responsible officials of the United States Government who, at the time of the hearing or previous thereto, occupied high-ranking personnel posi-

Affidavit in Support of Plaintiff's Motion.

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tions and whose official duties required them to be fully familiar with standards of suitability for Federal employment. The said officials testifying with respect to their knowledge of deponent's conduct over a period of years all affirmed that he was a loyal, devoted and exceptionally valuable public servant; that whatever opinions he may have had, and they were aware of his opinions, they were the opinions of an independent loyal American citizen, exercising his right and his duty to think and express himself about the political issues of the day.

24. A stenographic transcript of this hearing before the Civil Service Commission's Board of Appeals and Review is in the secret files of the Civil Service Commission. Deponent and his counsel were afforded an opportunity to examine the said transcript in the offices of the Civil Service Commission and to copy some excerpts therefrom. No copy of the transcript was given to deponent or his counsel, however, and by letter, dated January 11, 1945, a copy of which is annexed hereto and made part hereof as Exhibit D, the Civil Service Commission specifically denied permission to make a copy of the transcript.

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25. Deponent has not been charged by the Civil Service Commission or the War Manpower Commission with violation of any of the provisions of the Hatch Act.

26. As Exhibits A and B attached hereto indicate on their face, the action of the War Manpower Commission in dismissing deponent was based solely upon the finding of his alleged ineligibility by the Civil Service Commission. Said dismissal was not due to a determination of his ineligibility by deponent's employing agency, the War Manpower Commission, nor was it due to a determination by the War Manpower Commission that the efficiency of the services would be promoted by his dismissal.

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27. Deponent is advised by counsel and, therefore, verily believes that the defendant, McNutt, in dismissing deponent solely upon the finding of the deponent's ineligibility by the Civil Service Commission, and in failing to exercise his own independent judgment as to whether there existed proper cause for such dismissal, acted unlawfully and in violation of the Lloyd-LaFollette Act and of deponent's rights thereunder, as is more fully set forth in the Complaint herein.

28. Deponent is advised by counsel and, therefore, verily believes that the defendants, Mitchell, McMillin and Fleming, in claiming their right to declare the deponent ineligible to continue to hold a position after he had been appointed to such a position, acted unlawfully and in violation of the Lloyd-LaFollette Act and of deponent's rights thereunder, as is more fully set forth in the Complaint herein.

29. The letter to deponent from the Civil Service Commission, dated June 5, 1944, and set forth in full above, indicates on its face that the sole grounds for the Civil Service Commission's finding of deponent's ineligibility were deponent's political views and affiliations.

30. Deponent is advised by counsel and, therefore, verily believes that the declaration of deponent's ineligibility by the Civil Service Commission was unlawful and capricious, without official authority, in violation of Section 2 of the Civil Service Act; Civil Service Rule 1, Section 2, promulgated by Executive Order No. 8587; Section 9 (a) of the Hatch Act, and the First and Fifth Amendments to the Constitution of the United States; and in violation of deponent's rights thereunder, as is more fully set forth in the Complaint herein.

Affidavit in Support of Plaintiff's Motion.

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WHEREFORE, deponent prays:

A. That the Court render a declaratory judgment that:

i. Deponent was improperly dismissed from his position with the War Manpower Commission and is entitled to reinstatement;

ii. The grounds upon which deponent's dismissal were based were improper and in violation of the First and Fifth Amendments to the Constitution of the United States, the Civil Service Act, the Hatch Act and of Civil Service Rule 1;

iii. The Civil Service Commission had no authority to require the dismissal of deponent, and that the war Manpower Commission was required to exercise its own discretion in determining whether there existed proper cause for the removal of deponent.

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B. That the Court order and direct the defendant, McNutt, as Chairman of the War Manpower Commission, or his successor in office, to reinstate the deponent.

C. That the Court grant an injunction enjoining the defendants Mitchell, McMillin and Flemming, as members of the United States Civil Service Commission, from interfering in any way with deponent's reinstatement with the War Manpower Commission or his employment in any other position, for which he is eligible, with any other agency of the United States Government.

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D. That the Court order and direct the defendants Mitchell, McMillin and Flemming to withdraw their cancellation of pending applications and existing eligibilities of deponent and restore his status as an applicant and/or eligible for any of the examinations which were affected by the Civil Service Commission's cancellation of August 16, 1944.

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Affidavit in Support of Plaintiff's Motion.

E. That the Court grant deponent such other and further relief as may be just and equitable in the premise.

F. That the defendants pay the costs of this action.

s/ MORTON FRIEDMAN.

(Verification dated October 11, 1945, omitted.)

(Note: Exhibits A, B and C, referred to in the foregoing affidavit, are duplicates of Exhibits A, B and C to the Complaint, and appear at pages 17-19, supra.)

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Exhibit D to Plaintiff's Supporting Affidavit.

UNITED STATES CIVIL SERVICE COMMISSION
Washington, D. C.

January 11, 1945

Morton Stavis, Esq.
Counselor at Law
270 Broadway
New York, N. Y.

My dear Mr. Stavis:

126

Reference is made to your letter of December 19, 1944, requesting on behalf of Mr. Morton Friedman that he be permitted at his own expense to make a copy of the transcript of the hearing held in his case before the Board of Appeals and Review of this office in January, 1943.

As you are aware, it is not the policy of the Commission to furnish copies of transcripts of hearings held before its Board of Appeals and Review. Such hearings are not open to the public and the primary purpose of hearings of this kind is to develop facts which would aid the Commission in reaching a decision on the issues involved. The transcripts

Exhibit D to Plaintiff's Supporting Affidavit.

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may be inspected by the parties in interest, that is, the appellant or his representative, for the purpose of making any corrections that are necessary to insure a correct reporting of the testimony or evidence produced at the hearing.

Since to permit appellants to make copies of the hearings would in effect indirectly authorize something which is not authorized directly the Commission has ruled that your request may not be granted.

By direction of the Commission:

Very respectfully,

JOHN F. EDWARDS, Chairman
Board of Appeals and Review

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Order Substituting Party Defendant.

Upon consideration of plaintiff's motion, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, for the substitution of Lewis B. Schwellenbach, individually and as Secretary of Labor, as a party defendant herein in the place and stead of the defendant, Paul V. McNutt, individually and as Chairman of the War Manpower Commission, the points and authorities in support thereof, and it appearing that there is no objection thereto, it is, by the Court, this 13th day of November, 1945,

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ORDERED, ADJUDGED AND DECREED that plaintiff's motion to substitute Lewis B. Schwellenbach, individually and as Secretary of Labor, as a party defendant herein, in the place and stead of the defendant, Paul V. McNutt, individually and as Chairman of the War Manpower Commission, be, and the same hereby is, granted.

s/ H. A. SCHWEINHAUT,
Justice.

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Defendants' Motion for Summary Judgment.

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The defendants, Lewis B. Schwellenbach, individually and as Secretary of Labor, and Harry B. Mitchell, Lucille Foster McMillin and Arthur S. Flemming, individually and as members of the Civil Service Commission, by their attorneys, John F. Sonnett, Assistant Attorney General, and Edward M. Curran, United States Attorney for the District of Columbia, upon the pleadings herein, upon the affidavit submitted by plaintiff in support of his motion heretofore made for summary judgment, upon the annexed affidavit of Lawson A. Moyer, Executive Director and Chief Examiner of the United States Civil Service Commission, verified the 13th day of December 1945, and upon all proceedings heretofore had herein, respectfully move the Court for summary judgment in favor of the defendants on the ground that there are no genuine issues as to any material fact and defendants are entitled to such judgment as a matter of law, on the ground that the Court lacks jurisdiction to grant the relief requested and for such further and other relief as may seem just and proper.

JOHN F. SONNETT,
Assistant Attorney General.

EDWARD M. CURRAN,
United States Attorney.

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**Affidavit in Support of Defendants' Motion for
Summary Judgment.**

CITY OF WASHINGTON, }
DISTRICT OF COLUMBIA, } ss. :

LAWSON A. MOYER, being duly sworn, deposes and says:

I am the Executive Director and Chief Examiner of the United States Civil Service Commission, the members of which are named as defendants in the above-entitled action. This affidavit is submitted in support of a motion for summary judgment made by the defendants in said action.

On February 16, 1942, the President, by virtue of the authority vested in him by Section 2 of the Civil Service Act, issued Executive Order No. 9063 (7 F. R. 1075) authorizing the Civil Service Commission to adopt and prescribe such special procedures and regulations relating to the recruitment, placement, and changes in status of personnel in Federal service as it determined to be necessary in order that there would be no delay during the war emergency in filling positions in the Federal service with qualified persons. Said Executive Order further provided that the procedures and regulations thus adopted and prescribed were to be binding with respect to all positions affected thereby which were subject to the provisions of the Civil Service Act and rules. The second paragraph of Executive Order No. 9063 stated that persons appointed solely by reason of any special procedures adopted under authority of said order to positions subject to the provisions of the Civil Service Act and rules were not thereby to acquire a classified (competitive) civil-service status, but, in the discretion of the Civil Service Commission, might be retained for the duration of the war and for 6 months thereafter.

137 The President on February 20, 1942, by Executive Order No. 9067 (7 F. R. 1407) further authorized the Civil Service Commission to secure information as to employees of executive departments and agencies who were deemed competent to perform essential war work in departments or agencies having a higher priority classification, and, with the consent of the employees concerned, to effect the transfer of any such employees to meet the personnel needs of a department or agency having a higher priority classification, and to adopt such rules and regulations and to establish such procedures as might be necessary to carry out its responsibilities thereunder. This Executive Order remained in effect until September 27, 1942 (Executive Order No. 9243, September 12, 1942).

Pursuant to Executive Orders 9063 and 9067, the Civil Service Commission prepared and adopted the War Service Regulations, effective March 16, 1942 (Title 5, CFR, Cum. Supp., Chapter I, Part 18; 7 F. R. 7723).

138 In order to expedite employment and transfers to meet war conditions, the Civil Service Commission, pursuant to the aforesaid Executive Orders, greatly expanded its use of conditional appointments and conditional transfers, a practice whereby the Commission effects an immediate employment or transfer, subject to a condition. The condition ordinarily imposed is that the person shall be subject to a character investigation for the purpose of ascertaining the qualifications determinable by such investigation. This procedure enables the Commission to fill a vacancy immediately and complete its examination of the applicant or transferee at a subsequent date. Prior to the war, the Commission's policy was to publish an announcement of the examination, stating the type of position, required qualifications, place of examination, etc., hold an examination, establish a register, and certify three names from the top of the register to the agency,

Affidavit in Support of Defendants' Motion.

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subject to a character investigation. To meet the necessity of rapid expansion of employment, the Commission, under the authority of Executive Order No. 9063, dispensed with this peacetime practice and resorted to speedier methods of recruitment. Persons were placed on the job under a conditional appointment or conditional transfer, and thereafter, the Commission conducted its investigation to ascertain certain factors of qualification before certifying as to the eligibility of the applicant or transferee.

The conditional appointment method has been in use since 1934, as evidenced by the copy of a minute of the Commission, dated January 29, 1934, which is annexed hereto as Exhibit I.

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The plaintiff's transfer on May 29, 1942, from the Federal Works Agency to the Division of Central Administrative Services, Office for Emergency Management, was made "subject to character investigation." A copy of the transfer action is annexed hereto as Exhibit II. Without change in status, plaintiff, while said investigation was being conducted and while certain of the events hereinafter described were taking place, was involved first in an interoffice transfer (September 16, 1942) to the War Manpower Commission Personnel Branch, Central Administrative Services, Office for Emergency Management, and later (March 27, 1943) in a group transfer shifting all personnel functions of the Office for Emergency Management to the constituent agencies of the Office for Emergency Management, in plaintiff's case, the War Manpower Commission.

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Until plaintiff's conditional transfer, effective May 29, 1942, to the Office for Emergency Management, his previous employment with the Federal Government had at all times been in positions excepted from the classified civil service. Said conditional transfer brought plaintiff for

Affidavit in Support of Defendants' Motion.

the first time within the scope of the War Service Regulations and the Civil Service Rules, and within the jurisdiction of the Civil Service Commission. He was at no time in the Federal classified civil service.

War Service Regulation II, Section 3 provides as follows:

An applicant may be denied examination and an eligible may be denied appointment for any one of the following reasons:

(a) Dismissal from the service for delinquency or misconduct;

(b) physical or mental unfitness for the position for which he applies: Provided, that the physical requirements may be waived in the case of any person entitled to disability preference;

(c) criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct;

(d) intentional false statements as to any material fact, or deception or fraud in securing examination or appointment;

(e) refusal to furnish testimony as required by Civil Service Rule XIV;

(f) habitual use of intoxicating beverages to excess;

(g) a reasonable doubt as to his loyalty to the Government of the United States;

(h) any legal disqualification for appointment.

Any of the reasons stated in the foregoing subdivisions from (b) through (h) inclusive, shall be sufficient cause for removal from the service.

Affidavit in Support of Defendants' Motion.

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These disqualifications are elements that come within the scope of an investigation and which usually are only discovered by investigation.

The Commission's established procedure and practice, which were followed in plaintiff's case, where a question of qualification to be determined by investigation is involved is as follows:

1. From the reports of investigation and other pertinent data pertaining to the case, a recommendation as to eligibility is made by a rating board to the Commission, which makes a decision as to the qualifications of the applicant or transferee, finding him eligible or ineligible for Federal employment.

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2. If the decision is that the applicant is ineligible, the applicant may enter an appeal to the Board of Appeals and Review of the Commission, within thirty days from the notification of such decision.

3. If the decision is appealed, the entire record is referred to the Board of Appeals and Review of the Commission before whom the applicant may appear in person with witnesses and counsel of his own choosing. A stenographic report is made of the hearing, after which the Board of Appeals and Review considers the matter *de novo* and makes a recommendation to the Commission. The Commission again considers the entire record, including the evidence produced at the hearing before the Board of Appeals and Review, and makes its decision based upon the entire record.

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4. If the decision of the Commission after a hearing before the Board of Appeals and Review is adverse to the applicant, he may appeal to the Commission for a hearing before the Commissioners personally, after which the Commission makes its final determination of the matter.

Pursuant to the condition set forth in the transfer of plaintiff on May 29, 1942, from the Federal Works Agency to the Division of Central Administrative Services, Office for Emergency Management, whereby the transfer and plaintiff's tenure were made subject to a character investigation, the Commission conducted an investigation as to plaintiff's qualifications, suitability, and fitness. As a result of that investigation, the Commission determined that there was a reasonable doubt as to plaintiff's loyalty to the Government of the United States and that plaintiff was therefore not eligible for Federal employment in a War Service status, and requested Central Administrative Services, Office for Emergency Management, to terminate his services. A copy of the letter dated October 27, 1942, requesting the termination is attached hereto as Exhibit III. Plaintiff appealed from this decision and a hearing was held on January 26, 1943, before the Board of Appeals and Review of the Commission. Thereafter, the Commission, upon review and reconsideration of the entire record, reaffirmed its determination that plaintiff was ineligible for Federal employment and by letter of May 3, 1943, so notified him. A copy of the letter of May 3, 1943, is attached hereto as Exhibit IV. The Office for Emergency Management was notified on May 3, 1943, that the Commission's previous action was affirmed. A copy of the letter to the Office for Emergency Management, dated May 3, 1943, is attached hereto as Exhibit V.

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The Office for Emergency Management, War Manpower Commission, by letter dated May 17, 1943, requested additional time in which to review the matter to consider the possibility of a direct appeal to the Civil Service Commission. A copy of the letter from the Office for Emergency Management, War Manpower Commission, dated May 17, 1943, is attached hereto as Exhibit VI. On October 13, 1943 the War Manpower Commission requested the Civil Service Commission to reconsider the matter and the Civil

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Affidavit in Support of Defendants' Motion.

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Service Commission, following reconsideration, advised the War Manpower Commission by letter of February 25, 1944, a copy of which is attached hereto as Exhibit VII, that it had again affirmed its original action. On March 23, 1944, the Office for Emergency Management, War Manpower Commission, notified the United States Civil Service Commission that plaintiff had requested a personal appearance before the Commissioners and that pending said personal appearance action looking toward his separation was being held in abeyance. The Civil Service Commission, in accordance with its usual policy, did not object to plaintiff's continued employment pending his appeals to the Board of Appeals and Review and the Civil Service Commission. A copy of the letter of March 23, 1944, is attached hereto as Exhibit VIII. This request for a personal appearance before the Commission was granted and a hearing was held before the Commissioners on April 19, 1944. On June 5, 1944, the Commission, after consideration of the entire record including the matters presented at the hearing held before them on April 19, 1944, reaffirmed its decision and so notified plaintiff by letter of June 5, 1944, as set forth in the complaint, paragraph 12. Said letter of June 5, 1944, set forth some of the principal factors which led the Civil Service Commission to conclude that there was a reasonable doubt as to plaintiff's loyalty, but said letter did not constitute, nor purport to constitute, a full statement of the specific reasons for the determination by the Civil Service Commission as to plaintiff's ineligibility, said determination being based upon the complete investigation made, including confidential reports of the Federal Bureau of Investigation.

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The War Manpower Commission was similarly notified by letter dated June 5, 1944, of the determination of the Civil Service Commission that plaintiff had been found ineligible, and the Civil Service Commission renewed its request that plaintiff's services be terminated by the War

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Affidavit in Support of Defendants' Motion.

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Manpower Commission. The War Manpower Commission advised that plaintiff's employment would be terminated as of July 10, 1944. (Letter of June 13, 1944, annexed hereto as Exhibit IX.) Under date of August 16, 1944, the Civil Service Commission advised plaintiff that any and all pending applications and eligibilities of plaintiff for examination were cancelled because information disclosed through investigation indicated that plaintiff did not measure up to the required standard of suitability and fitness. A copy of said letter of August 16, 1944, is annexed hereto as Exhibit X. The records of the Civil Service Commission do not disclose that plaintiff had any applications or eligibilities for examination then pending.

s/ LAWSON A. MOYER.

(Verification dated December 13, 1946, omitted.)

Exhibit I to Defendants' Supporting Affidavit.

MINUTES OF JANUARY 29, 1934—MONDAY

* * * * *

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3. *Commission—Certification for appointment to positions requiring character investigation.*—If all eligibles on a register for a position requiring character investigation by the Commission have been certified for appointment and it becomes necessary to fill additional vacancies in such positions by the certification of eligibles who have not been investigated, a certificate will be issued for probational appointment subject to the appointee qualifying in the character investigation.

The character investigation will receive primary consideration and every effort will be made to complete the investigation within six months after the appointment is made.

* * * * *

Exhibit II to Defendants' Supporting Affidavit.

OFFICE FOR EMERGENCY MANAGEMENT

Washington, D. C.

Name: Friedman, Morton.

Nature of action: A. Transfer.

From:

To: Principal Position, Classification Analyst, CAF-11,
\$3,800 per annum, Division of Central Administrative
Services, Personnel Office (Service Operations), Classifi-
cation Section, Washington, D. C., Departmental.

CSS or other legal authority: A-27054 SX; edp:
AGC 5/25/42.

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Appropriations: B-2.

Date of birth: 11/30/10.

Legal residence: New York.

Sex: M. Race: W.

Effective date: May 29, 1942. PCD No. Add. Iden.
CAF-11-179 (Donald C. Wilson). Alloc. 12/8/41. Bur.
No. 181AC.

Under Executive Order 9067, Section 3, Regulation IX.

Tenure subject to character investigation.

By transfer from the Federal Works Agency.

(S) GEORGE F. HOMSEN,
Acting Chief, General OEM,
Personnel Branch.

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Exhibit III to Defendants' Supporting Affidavit.

BAR:AK:MGW

UNITED STATES CIVIL SERVICE COMMISSION

Washington, D. C.

October 27, 1942.

MR. DALLAS DORT, Director
Division of Central Administrative Services
Office for Emergency Management
Washington, D. C.

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DEAR MR. DORT: The Commission has given consideration to the case of Mr. Morton Friedman, serving in your organization by transfer from the Work Projects Administration, subject to investigation.

In view of the information contained in the reports of investigation made by the Federal Bureau of Investigation, which you transmitted with your letter of September 4, 1942, the Commission has reached the conclusion that the best interests of the Government would be served by terminating Mr. Friedman's employment. He has accordingly been rated ineligible and the Office for Emergency Management is requested to terminate his services and to advise the Commission when such action has been taken.

By direction of the Commission.

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Very respectfully,

(S) L. A. MOYER,
L. A. Moyer,
Executive Director and Chief Examiner.

Exhibit IV to Defendants' Supporting Affidavit.

BAR:JFE:CD

UNITED STATES CIVIL SERVICE COMMISSION
Washington, D. C.

May 3, 1943.

MR. MORTON FRIEDMAN
c/o Personnel Office, War Manpower Commission
Social Security Building, Washington, D. C.

MY DEAR MR. FRIEDMAN: Reference is made to your appeal from the action of the Commission in rating you ineligible for Principal Position Classification Analyst and requesting the Office for Emergency Management to terminate your services.

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The Commission has considered the entire record in your case, including information and testimony submitted in connection with your appeal, and has affirmed the original decision.

By direction of the Commission.

Very respectfully,

(S) WM. C. HULL,
Wm. C. Hull,
Executive Assistant. 165

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Exhibit V to Defendants' Supporting Affidavit.

BAR:JFE:GD

UNITED STATES CIVIL SERVICE COMMISSION
Washington, D. C.

May 3, 1943.

MR. DALLAS DORT, Director
Division of Central Administrative Services
Office for Emergency Management
Washington, D. C.

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DEAR MR. DORT: Further reference is made to the case of Mr. Morton Friedman, whose separation from the service was requested in the Commission's letter of October 27, 1942.

Mr. Friedman appealed from the Commission's decision and was granted a hearing at which testimony was taken, and written statements from persons who had known him were submitted for the record. The Commission has considered the entire record in Mr. Friedman's case and has reached the conclusion that the previous action should be affirmed. He has been advised accordingly. Please advise this office of the effective date of the termination of his services.

By direction of the Commission.

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Very respectfully,

(S) L. A. MOYER,
L. A. Moyer,
Executive Director and Chief Examiner.

Exhibit VI to Defendants' Supporting Affidavit.

OFFICE FOR EMERGENCY MANAGEMENT
WAR MANPOWER COMMISSION
Washington, D. C.

PAUL V. McNUTT, Chairman
Federal Security Administrator

May 17, 1943.

MR. L. A. MOYER,
Executive Director and Chief Examiner
United States Civil Service Commission
Washington, D. C.

DEAR MR. MOYER: Your letter of May 3, 1943, addressed to Mr. Dallas Dort, Director of Central Administrative Services, Office for Emergency Management, indicating the decision of the Board of Appeals and Review of the Civil Service Commission in the case of the appeal of Morton J. Friedman, has been referred to this office.

Mr. Friedman was transferred to the War Manpower Commission on March 27, 1943, by letter from the Bureau of the Budget, transferring all personnel functions of the Office for Emergency Management to the Constituent agencies of the Office for Emergency Management. This letter was confirmed by Executive Order No. 9330. Accordingly, authority for any action to be taken with respect to Mr. Friedman is now vested in the War Manpower Commission.

Your letter of May 3, 1943, to Mr. Dort was the first official notification which had been received by the War Manpower Commission concerning this case. Because of this fact, we wish to refrain from taking action in this matter until the War Manpower Commission can make a preliminary investigation of the facts in the case, and give consideration to the possibility of a formal appeal

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Exhibit VI to Defendants' Supporting Affidavit.

by this agency from the ruling of the Board of Appeals and Review for hearing by the United States Civil Service Commission.

Accordingly, we shall give this matter prompt attention and inform you in the near future as to our official stand in the matter.

Sincerely yours,

(S) VERNON D. NORTHROP,

Vernon D. Northrop,

Director,

Office of Personnel Administration.

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Exhibit VII to Defendants' Supporting Affidavit.

UNITED STATES CIVIL SERVICE COMMISSION
Washington, D. C.

BAR:JFE:HRS

February 25, 1944.

MR. VERNON A. MCGEE

Assistant Executive Director for

Business Management

War Manpower Commission

Washington, D. C.

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DEAR MR. MCGEE: Reference is made to your memorandum of October 13, 1943, and previous correspondence concerning the case of Mr. Morton Friedman whose separation from the service was originally requested by letter of October 27, 1942, addressed to the Director, Division of Central Administrative Services, Office for Emergency Management.

Exhibit VII to Defendants' Supporting Affidavit.

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The Commission has very carefully considered the statements contained in your memorandum as well as the comments by the War Manpower Commission Committee submitted under date of June 2, 1943, and has again affirmed the original action in Mr. Friedman's case. Request for his separation from the service is therefore renewed.

By direction of the Commission.

Very respectfully,

(S) L. A. MOYER,
L. A. Moyer,
Executive Director and Chief Examiner.

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Exhibit VIII to Defendants' Supporting Affidavit.

OFFICE FOR EMERGENCY MANAGEMENT
WAR MANPOWER COMMISSION
Washington 25, D. C.

PAUL V. McNUTT, Chairman
Federal Security Administrator

March 23, 1944.

Confidential

U. S. CIVIL SERVICE COMMISSION,
Washington, D. C.

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(Attention: Mr. L. A. Moyer.)

GENTLEMEN: This will refer to your letter of February 25, 1944, addressed to Mr. Vernon McGee, regarding the case of Mr. Morton Friedman.

Mr. Friedman has requested a personal appearance before the Commissioners and action looking toward his

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Exhibit VIII to Defendants' Supporting Affidavit.

separation is, therefore, not being taken pending this hearing.

The request for a personal appearance was made to Mr. Hull.

Very truly yours,

(S) R. M. BARNETT,
R. M. Barnett,
Director of Personnel.

Hearing held before Commissioners 4/19/44—24 P. M.

Present:

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The Commissioners.
Mr. Klein.
Mr. Edwards.
Mr. Friedman.
Mr. Stavis.
Mr. Barnett.

Hearing: 2:30, 4/6/44.
WCH.

Exhibit IX to Defendants' Supporting Affidavit.

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OFFICE FOR EMERGENCY MANAGEMENT
WAR MANPOWER COMMISSION
Washington, D. C.

June 13, 1944.

U. S. CIVIL SERVICE COMMISSION
Washington, D. C.

(Attention: Mr. William C. Hull.)

Gentlemen: Following receipt of your letter of June 5, 1944, File BAR:JFE:GD, stating that Mr. Morton

Exhibit IX to Defendants' Supporting Affidavit.

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Friedman had been held to be ineligible to continue in his position with the War Manpower Commission, administrative action has been taken to separate him from the service. The journal approving this action was approved by the Chairman of the War Manpower Commission on June 12.

Due to unfinished work in Mr. Friedman's Division, we have made the effective date of his separation at the close of business July 10, 1944, plus his accumulated annual leave.

Very truly yours,

(S) R. M. BARNETT,
R. M. Barnett,
Director of Personnel.

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Exhibit X to Defendants' Supporting Affidavit.

August 16, 1944.

MR. MORTON FRIEDMAN
106 Cameron Road
Falls Church, Virginia

• The Commission informs you that your application and/or eligibilities for each of the examinations listed below have been canceled as of February 18, 1944, because of information disclosed through investigation which indicates that you do not measure up to the standard of general suitability and fitness maintained for Government employment.

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UNITED STATES CIVIL SERVICE COMMISSION.

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Opinion.

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This is an action for declaratory judgment, mandamus, and injunction. Originally named as defendants were Paul V. McNutt, individually and as Chairman of the War Manpower Commission, and Harry B. Mitchell, Lucille Foster McMillin, and Arthur S. Flemming, individually and as members of the United States Civil Service Commission. Because of the resignation of Mr. McNutt as Chairman of the War Manpower Commission and the transfer on September 17, 1945, pursuant to Executive Order No. 9617 (10 F. R. 11929), of that wartime agency and all of its functions, employees, and records, with certain exceptions not here material, to the Department of Labor, Lewis B. Schwellenbach, individually and as Secretary of Labor, has been substituted as a party defendant herein by order of the court dated November 13, 1945.

The plaintiff, who was an employee of the War Manpower Commission, seeks a declaration that he was improperly and unlawfully discharged from that Agency and an order directing his reinstatement. He also seeks injunctive relief against the members of the Civil Service Commission who directed the War Manpower Commission to dismiss him and who, in addition, cancelled all his pending eligibilities for Civil Service employment.

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The defendants moved to dismiss the complaint but the court deferred action until the filing of an answer. Since the filing of the answer the plaintiff and defendants have filed motions for a summary judgment.

On February 16, 1942, the President, by virtue of the authority vested in him by section 2 of the Civil Service Act, issued Executive Order No. 9063 (7 F. R. 1075) authorizing the Civil Service Commission to adopt and prescribe such special procedures and regulations relating to the recruitment, placement, and changes in status of personnel in Federal service as it determined to be necessary in order that there would be no delay during the war emergency in filling positions in the Federal service with

qualified persons. Said Executive Order further provided that the procedures and regulations thus adopted and prescribed were to be binding with respect to all positions affected thereby which were subject to the provisions of the Civil Service Act and rules. The second paragraph of Executive Order 9063 stated that persons appointed solely by reason of any special procedures adopted under authority of said order to positions subject to the provisions of the Civil Service Act and rules were not thereby to acquire a classified (competitive) civil-service status, but, in the discretion of the Civil Service Commission, might be retained for the duration of the war and for 6 months thereafter.

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The President on February 20, 1942, by Executive Order No. 9067 (7 F. R. 1407), further authorized the Civil Service Commission to secure information as to employees of executive departments and agencies who were deemed competent to perform essential war work in departments or agencies having a higher priority classification, and, with the consent of the employees concerned, to effect the transfer of any such employee to meet the personnel needs of a department or agency, having a higher priority classification, and to adopt such rules and regulations and to establish such procedures as might be necessary to carry out its responsibilities thereunder. This Executive Order remained in effect until September 27, 1942 (Executive Order No. 9243, September 12, 1942).

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Pursuant to Executive Orders 9063 and 9067, the Civil Service Commission prepared and adopted the War Service Regulations, effective March 16, 1942 (Title 5, C. F. R., Cum. Supp., Chapter I, Part 18; 7 F. R. 7723).

In order to expedite employment and transfers to meet war conditions, the Civil Service Commission, pursuant to the aforesaid Executive Orders, expanded its use of conditional appointments and conditional transfers, a practice whereby the Commission effects an immediate employ-

ment or transfer, subject to a condition. The condition ordinarily imposed is that the person shall be subject to a character investigation for the purposes of ascertaining the qualifications determinable by such investigation. This procedure enables the Commission to fill a vacancy immediately and complete its examination of the applicant or transferee at a subsequent date. Prior to the war, the Commission's policy was to publish an announcement of the examination, stating the type of position, required qualifications, place of examination, etc., hold an examination, establish a register and certify three names from the top of the register to the agency subject to a character investigation. To meet the necessity of rapid expansion of employment, the Commission, under the authority of Executive Order 9063, dispensed with this peace-time practice and resorted to the speedier methods of recruitment. Persons were placed on the job under a conditional appointment or conditional transfer, and thereafter, the Commission conducted its investigation to ascertain certain factors of qualification before certifying as to the eligibility of the applicant or transferee.

Plaintiff was transferred on May 29, 1942, from the Federal Works Agency to the Division of Central Administrative Services, Office for Emergency Management. This transfer was expressly made "subject to character investigation". Without change in status plaintiff, while said investigation was being conducted and while certain of the events hereinafter described were taking place, was involved first in an interoffice transfer (September 16, 1942) to the War Manpower Commission Personnel Branch, Central Administrative Services, Office for Emergency Management, and later (March 27, 1943) in a group transfer shifting all personnel functions of the Office for Emergency Management to the constituent agencies of the Office for Emergency Management, in plaintiff's case, the War Manpower Commission.

Until plaintiff's conditional transfer, effective May 29, 1942, to the Office for Emergency Management, his previous employment with the Federal Government had at all times been in positions excepted from the classified civil service (Act of November 26, 1940, Section 1, 54 Stat. 1211; 5 U. S. C. 631 (a)). Said conditional transfer brought plaintiff for the first time within the scope of the War Service Regulations and the Civil Service Rules, and within the jurisdiction of the Civil Service Commission. He was at no time in the Federal classified civil service.

War Service Regulation II, Section 3, provides as follows:

An applicant may be denied examination and an eligible may be denied appointment for any one of the following reasons:

* * * * *

(g) a reasonable doubt as to his loyalty to the Government of the United States;

* * * * *

Any of the reasons stated in the foregoing subdivisions from (b) through (h) inclusive, shall be sufficient cause for removal from the service.

These disqualifications are elements that come within the scope of an investigation and which usually are only discovered by investigation.

The Commission's established procedure and practice were followed in plaintiff's case where a question of qualification to be determined by investigation is involved.

Pursuant to the condition set forth in the transfer of plaintiff on May 29, 1942, from the Federal Works Agency to the Division of Central Administrative Services, Office for Emergency Management, whereby the transfer and plaintiff's tenure were made subject to a character investigation, the Commission conducted an investigation as to plaintiff's qualifications, suitability, and fitness. As a

result of that investigation, the Commission determined that there was a reasonable doubt as to plaintiff's loyalty to the Government of the United States and that plaintiff was therefore not eligible for Federal employment in a War Service status and, under date of October 27, 1942, requested Central Administrative Services, Office for Emergency Management, to terminate his services. Plaintiff appealed from this decision and a hearing was held on January 26, 1943, before the Board of Appeals and Review of the Commission. At said hearing plaintiff was given full opportunity to present for consideration all the evidence and testimony he desired on the question of his eligibility for a War Service appointment. Thereafter, the Commission, upon review and reconsideration of the entire record, reaffirmed its determination that plaintiff was ineligible for Federal employment and by letter of May 3, 1943, so notified him. The Office for Emergency Management was also notified on May 3, 1943, that the Commission's previous action had been affirmed.

The plaintiff appealed to the proper authorities and exhausted all administrative remedies.

On June 5, 1944, the Commission, after consideration of the complete record, reaffirmed its decision and so notified plaintiff by letter on June 5, 1944. Said letter is as follows:

"UNITED STATES CIVIL SERVICE COMMISSION
Washington, D. C.

File: BAR:JFE:GB

June 5, 1944

"Mr. Morton Friedman
c/o Personnel Office
War Manpower Commission
Washington, D. C.

My Dear Mr. Friedman:

Reference is made to your appearance before the Commission on April 19, 1944, in further prosecution

of your appeal from the finding of ineligibility for continuance in the service.

The Commission has given most careful consideration to your case including the information developed during the course of the investigations which were made and the testimony before the Board of Appeals and Review at the hearing which was accorded you. Particular attention, however, has been given to your statements and based upon those statements the Commission has concluded that the finding of ineligibility was in accordance with the standards applied in such cases and therefore has affirmed the previous action.

The Commission's action was based mainly on your activities in connection with the American Peace Mobilization and your shift in attitude and point of view following the declaration of war between Germany and Russia. It may be true that many members of the American Peace Mobilization were not aware that it was Communist-dominated and pro-Communist but it is generally recognized that those who were prominently and actively affiliated with that organization were people who over a period of time had shown sympathy with the Communist cause. Your testimony was that you were sent to the first meeting of the American Peace Mobilization in Chicago as a representative of your local union; that you also were sent to a meeting of the organization in New York City as a delegate, and that you participated actively in their meetings and affairs. You also testified that you were active in the affairs of the Washington Peace Mobilization and served on several of its committees.

You were admittedly opposed to the United States participating in war before the invasion of Russia by Germany but thereafter you changed your mind and were of the opinion that this country should fight along

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Opinion.

with the other United Nations. Just how long it was before Pearl Harbor that you changed your mind is not definitely established, but on the occasion of your appearance before the Commission you indicated that it was probably in August of 1941, which obviously was soon after June 22, 1941.

These matters, together with other activities which have been personally discussed with you, are convincing to the Commission that you are not eligible for retention in the service according to the standards observed by the Commission.

By direction of the Commission:

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Very respectfully,

s/ WILLIAM C. HULL
Executive Assistant."

Accordingly, plaintiff's employment was terminated September 12, 1944.

Under date of August 16, 1944, the Civil Service Commission advised plaintiff that any and all applications and eligibilities of plaintiff for examinations were cancelled because information disclosed through investigation indicated that plaintiff did not measure up to the required standard of suitability and fitness. The records of the Civil Service Commission do not disclose that plaintiff had any applications or eligibilities for examination then pending.

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The position held by plaintiff during the period April 18, 1943, to September 12, 1944, was that of Chief of the Classification Division of the War Manpower Commission. Plaintiff's employment was thus closely related to the efficient operation of an agency having important duties and heavy responsibilities in mobilizing the Nation's war effort.

The action of the Civil Service Commission in determining, after thorough investigation, that there was a rea-

sonable doubt as to plaintiff's loyalty and that therefore he was not qualified under the controlling regulations to obtain a War Service appointment, is asserted to be unlawful as in violation of the Civil Service Act, Civil Service Rule I, Sec. 2, and Sec. 9 (a) of the Hatch Political Activities Act. It is also argued that such determination by the Commission abridges plaintiff's fundamental rights guaranteed by the First and Fifth Amendments to the Constitution. The further contention is made that the termination of plaintiff's employment by the War Manpower Commission as a result of the Commission's finding of ineligibility, was in violation of Section 6 of the Lloyd-LaFollette Act. None of these assertions can be sustained. The Commission's action was in all respects in complete conformity with law. There has been no unlawful infringement of plaintiff's constitutional liberties.

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This is not a case of removal after an absolute appointment. Plaintiff's employment was terminated because he was found ineligible or not qualified to receive a War Service appointment. This is not a case in which plaintiff has been determined to be disloyal. The Commission's determination was only that there was a reasonable doubt as to plaintiff's loyalty to the Government of the United States.

The plaintiff conceded that the right to disqualify Federal employees because of a reasonable doubt of their loyalty would seem obvious enough in time of war. The Commission found reasonable doubt of the loyalty of the plaintiff. It based its findings in part upon the fact that the plaintiff was a member of, and prominently and actively affiliated with the American Peace Mobilization; participated actively in its meetings and affairs, and served on several of its committees. There were reasonable grounds to believe that this organization was formed under the auspices of the Communist Party designed to influence

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the American people to oppose participation in the war against Germany. Within a month after the German invasion of Russia its name was changed to American Peoples' Mobilization and then favored assistance to Britain and Russia in the war against Germany. It can hardly be said that there could be no reasonable doubt of the loyalty of a member of a communist organization who opposed war against Germany so long as this country was an ally of Great Britain, a democracy, but became an advocate of war when this country became allied with Russia, a communistic and totalitarian state. The defendants did not find that the plaintiff was disloyal. It was not necessary to go so far; it merely found that it had a reasonable doubt of his loyalty.

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It is difficult to see that the Hatch Act has any application to this case. That Act prohibits Federal employees from taking any active part in political management or political campaigns. It is true that under that Act Federal employees retain the right to express their opinions on all political subjects to the same extent as other citizens. The plaintiff has not been denied the right to express his opinions, but if his opinions as expressed and his conduct in conformance with those opinions have raised a reasonable doubt in the minds of the Commission of his loyalty, there is nothing in the Hatch Act that would prevent his removal from office.

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The plaintiff also claims that the action of the Commission was in violation of the Lloyd-LaFollette Act, but the plaintiff was not in the classified competitive civil service, and the provisions of the Lloyd-LaFollette Act apply only to persons in the classified civil service.

Apart, however, from the question of whether there was any substantial ground for the action of the Commission, it has acted pursuant to law and the courts are without jurisdiction to control its action so long as it complies with

the law. This principle has been followed ever since the case of *Decatur v. Paulding*, 39 U. S. 496. In *Levine v. Farley*, 107 F. (2d) 186, the Court of Appeals of the District of Columbia affirmed the action of the lower court in dismissing the suit of a plaintiff who sought a writ of mandamus against the Postmaster General to compel the reinstatement of the plaintiff in a position from which he had been removed, the plaintiff claiming that he had been unjustly removed as a result of unfair discrimination. The court said:

“We, therefore, hold that, where action is taken in removing from office an employee in the classified service and the action is in accordance with requirements of the statute relating thereto, such action is not reviewable by mandamus, and a court of law has no jurisdiction to inquire into the guilt or innocence of the employees as to the charges upon which he was removed.” 212

There are many decisions to the same effect.

It appears, then, that there has been no violation of law by the Commission.

Both the plaintiff and the defendants have moved respectively for a summary judgment. There are no genuine issues of fact; the case is a proper one for that procedure. The motion of the plaintiff for summary judgment will be overruled; that of the defendants sustained and the complaint dismissed with costs. 213

S/ JENNINGS BAILEY,
Justice.

April 1, 1946.

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Order.

Upon consideration of plaintiff's motion for summary judgment, the affidavit and points and authorities in support thereof, the defendants' motion for summary judgment, the affidavit and points and authorities in support thereof, heretofore filed herein, upon argument of counsel in open court, and upon all the proceedings herein, and consideration thereof, it is, by the Court this 18th day of April 1946,

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ORDERED, ADJUDGED AND DECREED that, in accordance with the opinion rendered by the Court in this cause on April 1, 1946, plaintiff's motion for summary judgment be, and the same hereby is, denied, and defendants' motion for summary judgment be, and the same hereby is, granted.

s/ JENNINGS BAILEY,
Justice.

Notice of Appeal.

(Filed April 24, 1946.)

Notice is hereby given that Morton Friedman, plaintiff above named, hereby appeals to the Court of Appeals for the District of Columbia from the order granting defendants' motion for summary judgment and denying plaintiff's motion for summary judgment entered in this Action on April 18, 1946.

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REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA *United States Court of Appeals
for the District of Columbia*

No. 9305

FILED NOV 8 - 1946

MORTON FRIEDMAN,

Frederick W. Starnes
Appellant, **CLERK**

v.

LEWIS B. SCHWELLENBACH, et al.,

Appellees.

Appeal from Order of the District Court for the
District of Columbia

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REPLY BRIEF FOR APPELLANT

For the most part, the points made by the defendants are anticipated and answered in our main brief. We shall limit our reply to the defendants' arguments to the extent that we have not heretofore covered the points raised.

The defendants do not dispute the facts alleged by the plaintiff in his complaint and the affidavit in support of his motion for summary judgment which are summarized in our main brief. The Court below found, "There are no genuine issues of fact" (App. 71).

POINT I

The Executive Department of the Government, while generally free from detailed control by the Judiciary, has no authority to violate the law.

Defendants argue at length (pp. 13-21)¹ and throughout their brief that the courts as a general rule will not interfere with the internal administration of the executive departments. This proposition is obviously true. But the defendants admit, as they must, that the Courts will inquire "if any law or constitutional provision prohibits the action taken and if the requirements of applicable procedural statutes were observed" (p. 19). Our position here is that the dismissal of plaintiff violated his statutory and constitutional rights, and the Court therefore cannot affirm the Civil Service Commission's action without satisfying itself as to its legality.

The Government argues that the Court should affirm the action of the Civil Service Commission under concepts of "forbearance of the court" (p. 14), the "principle of non-intervention" (p. 14), the sanctity of the "exercise of judgment and discretion by the Executive" (pp. 18-19), and the

¹ All references to pages in this brief, unless otherwise indicated, refer to the Government's brief. Emphasis in quotations is supplied.

“separation of functions” (p. 19). But no amount of redundant contentions of this type can mask the simple point that violations of statutes or the Constitution will not be tolerated by the courts.

It will be observed that despite the copious citation of authority by the Government (pp. 14-15), it has not attempted to distinguish or even seen fit to take note of the case of *United States v. Wickersham*, 201 U. S. 390, 26 S. Ct. 469 (1906), which is a square holding that a dismissal of a Federal employee in violation of a rule promulgated by the President “was without legal effect” (201 U. S. at 395, 26 S. Ct. at 472), and gave rise to rights enforceable by judicial action. Nor has the Government even mentioned the most recent case on this problem, decided by this very Court, *Borak v. Biddle*, 78 App. D. C. 374, 141 F. 2d 278, cert. den. 323 U. S. 738, 65 S. Ct. 42 (1944), which reaffirmed the availability of judicial relief where the dismissal of a Government employee was in violation of law. See also *Whitwell v. U. S. ex rel. Selden*, 61 App. D. C. 169, 58 F. 2d 895 (1932); cf. *Spanhake v. United States*, 55 Ct. Cl. 70 (1920).

The point of the case then is simply that plaintiff was dismissed, as stated in the letter of the Commission dated June 5, 1944 (App. 66-68), because he held certain opinions on a major political issue, and was a member of a lawful organization advocating those opinions, and that such dismissal was in violation of the Civil Service Act, the rules thereunder, the Hatch Act, and the Constitution.

While the defendants argue extensively that plaintiff was dismissed because of doubts as to his loyalty, the Court will note that the reasons for the Commission's action are stated in detail in its letter of June 5, 1944, which on its face shows a dismissal because of political convictions. All the discussion about “doubts as to loyalty” is, as we have demonstrated in our main brief (pp. 25 ff., and see *infra*, pp. 15 ff.), merely an attempt to veil a difference of political opinion in the guise of doubts as to loyalty. No invocation of administrative discretion can therefore protect the

Government from its violation of the Constitution and the law.

The Government attempts to assimilate the disqualification of the plaintiff in this case with cases of disqualification on the grounds of insufficient experience or intelligence, or physical disability (p. 19). But such cases clearly involve the exercise of administrative discretion, and do not present the clear-cut issue of violation of statutory or constitutional protection for Federal employees. Moreover, if such a case did involve violations of this protection—if, for example, the Commission sought to disqualify an individual because of inefficiency, and articulated as its reason therefore the fact that he was a member of the Democratic Party and was thus incompetent to serve in a Republican administration, or vice versa,—then we believe no court would permit the Commission to mask its political disqualification of the employee in the guise of a charge of inefficiency. Thus, in *Perkins v. Elg*, 307 U. S. 325, 59 S. Ct. 884 (1939), the Supreme Court held that while the issuance of a passport was vested in the discretion of the Secretary of State, judicial relief was obtainable against his refusal of a passport on improper grounds; and in *Securities and Exchange Commission v. Chenery Corporation*, 318 U. S. 80 at 95, 63 S. Ct. 454 at 462 (1943), the Supreme Court said: "An administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."

There is no issue whatever in this case of proof as to the reasons of the Civil Service Commission in disqualifying the plaintiff. The Commission has clearly specified the grounds for its action in its letter of June 5, 1944, which plainly states that the plaintiff was dismissed because of his political beliefs and affiliations, an illegal ground for dismissal. A claim that a discretionary power was exercised cannot put the Commission's clearly unlawful action beyond the power of this Court.

The Government asserts that "the Commission's determination does not bar plaintiff from all Federal employment", and that should he reapply "the issue of loyalty would be again reviewed" (p. 8-9). This sanctimonious deception, unfortunately, offers no hope to plaintiff and falls short of curing the Commission's violation of law. For were plaintiff to seek Government employment anew, the facts as to his views in 1941 would of course remain unchanged. If the Commission's test of loyalty is valid, he would remain disqualified by its standards.

POINT II

The action of the Civil Service Commission was subject to controlling statutes, rules and the Constitution.

Defendants' memorandum by a plethora of argument (pp. 20-35) attempts to prove that none of the several accepted guarantees of the political freedom of Federal employees applies to the plaintiff. These contentions have the weakness of all arguments that prove too much.

A. The Civil Service Act and Rules

1. The Government contends (pp. 31-33) that the Civil Service Act and Rule I, Section 2, afford protection only against the spoils system and the evils of patronage; that they protect only party politicians and do not protect freedom of political opinion generally. This is a strange argument in the face of the clear and broad language of the Rule. That Rule specifically states:

"No discrimination shall be exercised, threatened, or promised by any person in the executive civil service against or in favor of an applicant, eligible, or employee in the classified service because of race, or his political or religious opinions or affiliations, except as may be authorized or required by law."

Despite this unequivocal language, the Government argues, in substance, that while there may be some safety in being a Republican, it is dangerous to be a prohibitionist unless a political party has been organized about that platform. And what of the protection of religious freedom? Must the Baptists and Catholics form political parties in order to gain protection for their adherents who may be civil service employees?

Obviously the Rule on its face extends protection beyond mere partisan politics, to political views generally. And in its brief before the Supreme Court of the United States, in *United Federal Workers of America v. Mitchell*, No. 20, this term, not yet decided, the Government made this very point. See the quotation in our main brief (p. 20).

2. While giving no reasons therefore, the Government makes the contention (p. 31) that the language of the Civil Service Act (Section 2, 6th paragraph, 2nd subdivision) that "no person in said service has any right to use his official authority or influence to coerce the political action of any person or body" does not protect the plaintiff. If the Commission has not attempted to influence or coerce the plaintiff's political action—and that of his fellow employees—by discharging the plaintiff, it must be blind to the obvious consequences of dismissal for holding political opinions which it proscribes.

B. The Hatch Act

1. Defendants' attempt (pp. 34-35) to explain away the provisions of the third sentence of Section 9(a) of the Hatch Act which states:

"All such persons (officers or employees in the executive branch of the Federal Government, or any agency or department thereof) shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates."

In the face of this clear language, the Government again tries to argue that it protects only party political opinions. The whole point of the Hatch Act was to *restrict party political activities*. This sentence was added to the Act to make it clear that *non-party* political activity (in the broad sense of the term "political", i.e., the expression of opinion on current political issues not in connection with a partisan political campaign) was permissible. The language of the Act significantly refers not merely to political candidates, but also to political subjects, which must comprehend political subjects in their broad, non-partisan aspects. This very point, too, is made clear by the interpretation of this sentence of Section 9(a) set forth in the Government's brief before the Supreme Court in *United Federal Workers of America v. Mitchell*, *supra*, also quoted in our main brief at p. 20.

2. If we correctly understand the obscure argument of the Government (at p. 35, first paragraph), it appears to contend that, under the third sentence of Section 9(a) of the Hatch Act, Federal employees "*retain* the right * * * to express their opinions on all political subjects", and that the statutory protection for the "retention" of the right is met by the fact that citizens at large would be denied Federal employment on the same grounds as the plaintiff. But the argument clearly assumes the conclusion that plaintiff's dismissal was lawful. For if it was not lawful, the illegality as to plaintiff would hardly be cured because the Commission treated all applicants in the same unlawful manner. It does not condone, but multiplies the illegality, to apply a political test for office to all applicants.

The word "retain" actually substantiates plaintiff's position. Plaintiff's views concededly could lawfully be held by a citizen not a Government employee. The statute permits such a citizen to become a Government employee and nevertheless "retain" these views, and expressly protects him against dismissal by reason of his holding them. Thus

President Roosevelt, in communicating to the Congress his approval of the Hatch Act, referred to an earlier message which recommended rigid regulations and penalties for improper political practices in the Works Progress Administration, but which carefully added the reservation—

“that no legislation should be enacted which will in any way deprive workers on the Works Progress Administration program of *the civil rights to which they are entitled in common with other citizens.*” 84 Cong. Rec. 10746 (1939).

The denial of such a right as to the plaintiff in this case is the very basis for the action here.

C. The Constitution

The Government contends (pp. 23-27) that no constitutional issue can be presented here because of the special Federal power over its employees. While the Government does not quite contend that their constitutional rights could never be violated by regulations applicable solely to them, it argues that its powers over its employees are almost limitless. This argument is at variance with the views of the Attorney General on the Hatch Act, which the President adopted. In his message on the Act, the President stated:

“The Attorney General has advised me that * * * qualifications (imposed by the Government restricting the political activities of its personnel) cannot properly preclude Government employees from the exercise of the right of free speech.” 84 Cong. Rec. 10746 (1939).

Thus, the mere fact that the political views involved are those of a Federal employee does not give the Government special power to control them or to punish the employee for holding them. The argument as to immunity from constitutional restriction must therefore fail. It is perfectly obvious that the views of the plaintiff, were he not a Federal employee, could never form the basis for discriminatory action against him. None of the Government's argu-

ment as to lack of "prior restraint" (p. 21) could justify sanctions against a member of the citizenry at large for expressing the views held by the plaintiff. Similarly plaintiff's views form no basis for punishing him.² If, as must be conceded, the Federal Government may not lawfully adopt a policy of dismissing all prohibitionists, or all Catholics, the Constitution likewise prohibits dismissal for other exercises of constitutional rights.

The Government also makes the related argument that Government employment is a privilege and that it may without limit impose conditions on its grant of the privilege (p. 27). This same argument was recently rejected very sharply by this Court and by the Supreme Court in *Esquire v. Walker*, 80 App. D. C. 145, 151 F. 2d 49 (1945), aff'd, 327 U. S. 146, 66 S. Ct. 456 (1946). As pointed out in our discussion of the *Esquire* case in our main brief (pp. 44-45), the Supreme Court's decision was based upon a fear of official censorship of political, social and economic views. While the Government in its brief now recognizes (p. 27, n. 11) that restrictions exist upon its right to withhold the postal privilege because that has become an integral part of American life, one wonders whether the Federal Government, as an employer of more than 3,000,000 persons, has not become quite as integral a part of American life in its regulations of employment.

D. Procedure

The Government argues that the plaintiff was accorded a fair hearing, and that his "case was considered and reconsidered at least four times" by or within the Commission (p. 23). This conceals the fact that the Board of Appeals and Review, which heard the witnesses, recommended that plaintiff not be discharged and that the two Government agencies by which he was employed, after reviewing all the evidence, exerted their best efforts to retain him. The Government, while conceding the fact that

² Dismissal from Government employment is a punishment. Its denial by Act of Congress has been termed "punishment * * * of a most severe type * * *." *United States v. Lovett*, ... U. S. at, 66 S. Ct. 1073 at 1079 (1946).

the plaintiff was denied the right to confrontation and cross-examination, claims that this lack was in effect cured by his right to introduce all the affirmative evidence on his behalf that he desired (*ibid.*). But the simple fact is that the plaintiff was never given an opportunity to introduce evidence questioning the qualifications and credibility of persons who informed against him, because he was never advised as to their identity and was not afforded an opportunity to confront them.

On the basis of such star-chamber proceedings the Commission has traduced his loyalty, defamed his character and blacklisted him from public employment.^{2a}

E. The War Powers

The Government also contends (pp. 27-31) that the war powers give it further well nigh limitless powers as to the plaintiff. No one disputes the war powers of the Government; but this country has never yet accepted the view that war is an occasion for the administrative imposition of political orthodoxy. It is well to recall that during the height of the recent war this country had one of the bitterest political campaigns in its history. And it has never been suggested that the war powers of the Government repealed the general protections of the civil service system.

The Government's citation (p. 29) of the case of *Hans Van Knorr v. Gen. Miles*, 60 F. Supp. 962 (D. Mass., 1945), affirmed on other grounds, 156 F. 2d 287 (C. C. A. 1, 1946), is unseemly. There an individual was excluded from employment in a war plant because he was obviously suspected of collaboration with an *enemy*.³ There has never been the slightest suggestion that the plaintiff in this case was any-

^{2a} In a recent address, one of the defendants, Commissioner Harry B. Mitchell, acknowledged:

"Admittedly, much of the evidence * * * was obtained in confidence and could not have been secured if it had to be produced in open court. For that reason many of these persons could not have been convicted as disloyal in an open trial." *PM*, October 25, 1946, p. 7.

³ It may be noted that the *Van Knorr* case is by no means clear law. The absolute power of the military there sustained was denied in several other cases. *Ebel v. Drum*, 52 F. Supp. 189 (D. Mass., 1943); *Schueller v. Drum*, 51 F. Supp. 383 (E. D. Pa., 1943); *Scherzberg v Madeira*, 57 F. Supp. 42 (E. D. Pa., 1944).

thing but wholeheartedly devoted to the defeat of our enemy.

The picture sought to be painted by the Government of a "dangerous" character, whom the Government had to eliminate from its midst in order to win the war, might be convenient for framing an argument, but it has little to do with actuality. We have already noted (our main brief, pp. 30-31) the inconsistency between this attempted portrait and the following facts: The Commission's permitting plaintiff to remain on his job for nearly two years after it had determined that it doubted his loyalty, the delay being "in accordance with its usual policy" (App. 51); the resistance to the Commission's action by plaintiff's employing agencies, after acquainting themselves with all the facts; the exoneration of plaintiff recommended by the Commission's own Board of Appeals and Review, after directly receiving the testimony of numerous highly qualified officials on plaintiff's behalf; and the acquiescence of the Commission in further postponing plaintiff's dismissal even after it had finally decided on his separation, because the war agency employing him had "unfinished work" for plaintiff to complete (App. 61), and would apparently have been inconvenienced and hindered in its work if plaintiff were to leave its service at the time the Commission directed.

Thus it is clear that plaintiff was neither disloyal nor dangerous. He was victimized solely because he differed with the Civil Service Commission in his analysis of political events.

The war powers of the Government are admittedly broad; but even in *Korematsu v. United States*, 323 U. S. 214, 65 S. Ct. 193 (1944), which involved a broad application of the war powers, the test applied was that of "clear and present danger". The Supreme Court said, 323 U. S. at 218, 65 S. Ct. at 195:

"Nothing short of apprehension by the proper military authorities of the *gravest imminent danger* to the public safety can constitutionally justify * * * (restraints imposed on a racial basis)."

The several facts just cited, exposing the farcical effort to depict plaintiff as a potential threat, clearly indicate that his employment was not only compatible with the public safety but was actually in furtherance of the war effort. Clearly therefore the war powers do not justify plaintiff's dismissal.

POINT III

The determination of the Civil Service Commission was plainly contrary to law.

The Government argues (pp. 36-44) that it may validly dismiss persons for the reasons given in its letter to the plaintiff of June 5, 1944. This is the issue in the case:

May an individual be discharged from the Federal service because—

- 1) "soon after June 22, 1941" he shifted his attitude and point of view regarding the necessity for American participation in the war, and
- 2) he was active in connection with the American Peace Mobilization, an organization expressing an opinion on the above matter?

The Government then proceeds to pitch its case on certain derogatory opinions which have been expressed about the American Peace Mobilization.

A. The Government (pp. 37-38) quotes extracts from an alleged statement of the Attorney General about the American Peace Mobilization. The quoted statement, however, was not and does not purport to be a finding or a ruling of the Attorney General. It does not appear among his published opinions. Indeed, the Government's briefs in this case are, to our knowledge, the first claim by the Department of Justice that the Attorney General was author of the statement. This attribution is hardly sufficient to

confer upon it the status of an official opinion. Moreover, it is doubtful whether the Attorney General (the Government's briefs to the contrary notwithstanding) can even today be charged with authorship. The fact is that in a previous report the Attorney General himself, referring to a group of statements, of which that regarding the American Peace Mobilization is presumably one, did not claim authorship of the documents but attributed them to subordinates. He said:

"The Special War Policies Unit of the War Division of the Department of Justice prepared brief statements concerning 14 of the so-called front organizations, and these statements were distributed among departments and agencies concerned for confidential use in administration under Public, No. 135" (H. Doc. 833, 77th Cong., 2nd Sess., 1942, p. 24).

To attempt to elevate this type of confidential memorandum to a "finding of the Attorney General" ignores the distinction between a ruling of the Attorney General in the performance of his official duties, and memoranda prepared by his subordinates. Little, if any, additional weight may be given to the document by the fact that the "congressional authority" cited by the Government as agreeing with it and as spreading it upon its records (p. 39) is the so-called Dies Committee. Cf. *United States v. Lovett*, *supra*, _____ U. S. _____ at _____, 66 S. Ct. at 1075-1076.

Aside from the dubious authorship of the statement attributed to the Attorney General, the excerpts quoted in the Government's brief omit at least one significant passage from it:

"* * * it has been estimated by the Federal Bureau of Investigation that American Peace Mobilization numbered as members or contributors about 14,000,000 persons." 88 Cong. Record 7444 (1942).

B. The Government cites excerpts from a broadcast by Mr. Elmer Davis on May 25, 1942, in support of its dismissal of plaintiff.

Its attempt to give these extracts an official character by stating that Mr. Davis was "then Director of the Office of War Information" (p. 60) is in error. The agency was created and Mr. Davis was appointed as its head on June 13, 1942 (New York Times, June 14, 1942). The political opinions of radio commentators, while perhaps interesting, are hardly criteria for determining qualifications for Government employment. Significantly, Mr. Davis himself on numerous occasions felt obliged to defend his agency against attacks of other officials charging it with harboring Communists.⁴

The damning of an individual by quoting against him the political views of public officers which differ from his is of course utterly inconsistent with our basic concepts of constitutional rights. No public office in the United States, even that of Attorney General, Civil Service Commissioner, or Director of the Office of War Information, vests its occupant with the power to prescribe political orthodoxy. *West Virginia v. Barnette*, 319 U. S. 624, 63 S. Ct. 1178 (1943), quoted in our main brief (p. 25).

But if public figures are to be matched against one another, then those who supported the right of Federal employees to espouse the views held by the plaintiff weigh more heavily in the scale. As we pointed out in our main brief, President Roosevelt protested the legislative dismissal of Messrs. Watson, Dodd and Lovett, who were charged with activity in various organizations, including the American Peace Mobilization (see our main brief, p. 23). Judge Warren J. Madden of the Court of Claims vigorously upheld the rights of these three men to their views, notwithstanding their being Federal employees. See opinion of Madden, J., in *Lovett, Watson and Dodd v. United States*, 104 Ct. Cl. 557 (1945), quoted *infra*, p. 18. And Paul V. McNutt, when Chairman of the War Manpower Commission, continuously resisted plaintiff's dismissal.

⁴ *New York Times*, March 29, 1944; 89 Cong. Rec. A-4249 (1943); 90 Cong. Rec. 2549-2550 (1944).

C. The Government next cites the so-called "Communist Party line test" of the Civil Service Commission and a statement of one of the defendants in this case, Commissioner Arthur S. Flemming (pp. 39-42). The self-serving character of these declarations is obvious. They constitute not authority for the Commission's action, but its defense in this case.

The absurd length to which these views extend is evidenced by the fact that only one of the numerous changes of political opinion there described sufficed to condemn the plaintiff in this case—and with him, the Commissioners, as we have shown (our main brief, p. 35), would have to damn 11,000,000 people whose views on American policy changed in a manner similar to the plaintiff's at about the same time.⁵

The difficulty with the Commission's test and with Mr. Flemming's opinion, however, is far more fundamental. It goes to the heart of this case.

Political thinking is a much more complex matter than would appear from the simple litmus-paper test of the Commission for divining inadequate loyalty. A change of mind as to American participation in the war after June 22, 1941, the date of the attack on Russia, is by this test indicative of excessive concern with the interests of Russia. Plaintiff's explanation of his views (our main brief, p. 29) afford a reason for such change of mind based upon considerations wholly different from those embodied in the Civil Service Commission test. And the Commission's Board of Appeals and Review, which observed plaintiff's demeanor during his testimony, was convinced of his sincerity. Various other grounds for a shift in position might

⁵ The decisive aspect of the Commission's test as to an individual who changed his mind on America's belligerency after the attack on Russia is "the suddenness of his switch". It is the "overnight" reversion which "gives him away" (p. 59).

The Commission's letter to plaintiff (App. 68) admits that the date of plaintiff's change of mind "is not definitely established", but it accepted plaintiff's statement that it was probably in August, 1941. The Gallup poll published on July 11, 1941, cited in our main brief (p. 35, note 17), indicates that 11,000,000 people changed their minds within three weeks after the Commission's key date of June 22, 1941.

well be advanced, all consistent with loyalty to the United States. Chester Bowles, for example, former Price Administrator and Director of Economic Stabilization, joined the America First Committee in 1940. He, too, subsequently changed his mind; and the occasion for the change was also the attack on Russia on June 22, 1941. He stated (*PM*, Sunday Magazine, October 20, 1946, p. 16):

“Until 1941 I thought of it (Hitlerism) as a passing phase, a local middle-European phenomenon, a bad answer to prolonged economic misery. When Hitler invaded Russia, although I am certainly no Communist, I realized that here was proof that it was more than an ordinary clash of old-world powers.”

As we noted in our main brief (pp. 32 ff.), opinions on American foreign policy may be formed or influenced with reference to the actions or positions of foreign countries. These actions or positions are the raw data on which views in this field may be formulated. To attribute to a specified opinion or sequence of opinions a charge of superior attachment to a foreign power permits the same accusation to be levelled at any one holding any view on foreign affairs.

With this approach, many could be condemned as following a “British party line”, a “French party line”,⁶ a “Spanish party line”, etc. Thus in a debate in Congress, holders of Rhodes scholarships in Government employment were suspected of advancing Cecil Rhodes’ plan for a “secret society” and a “political revolution” for British domination of the world (89 Con. Rec. 765 *et seq.*, 1943). On various measures affecting foreign policy and defense preparations, such as the pre-war fortification of Guam, the draft, lend-lease, the Fulbright resolution on international unity, the recent loan to Britain, and many similar

⁶ In fact, in the Jeffersonian era the Federalists were commonly referred to as the “English party” and the Jeffersonians as the “French party”. And the odious Alien and Sedition Acts passed during the Madison administration represented an effort by the “English party” to curb the “French party” in the expression of its views. 2 Beveridge, *Life of John Marshall* (1916), 311-312, 319, 332, 383, n. 2.

issues, Congressional and public debates are replete with charges and imputations that a particular view is motivated by excessive devotion to the interests of a foreign power. President Roosevelt was frequently attacked on this ground.⁷

Religious beliefs are not immune from this type of accusation. In the 1928 Presidential campaign, charges were made against Alfred E. Smith "by ignorant and bigoted persons" to the effect that "members of the Catholic church have put their allegiance and loyalty to the spiritual head of that church before their duty to their country" (letter of George Gordon Battle, *New York Times*, September 16, 1928, Section III, p. 5).

A characteristic of the American people is their multinational origin, and many second- or third-generation citizens or naturalized citizens possess a "normal attachment * * * to the lands of their forefathers." Murphy, J., concurring in *Hirabayashi v. United States*, 320 U. S. 81 at 111, 63 S. Ct. 1375 at 1390 (1943). Such citizens, individually or in groups, frequently express views on foreign policy relating to those lands, and ask our Government to adopt and press for their position. The logic of the Civil Service Commission test would place the loyalty of all such groups under a cloud.

The menacing implications of the Commission's position in branding plaintiff's loyalty as doubtful become sharply exposed as applied to the current national debate on foreign policy. Henry Wallace, former Secretary of Commerce, advocated a more conciliatory American policy in dealing with Russia, and a policy more independent of Great Britain's interests. He was promptly accused of a variety of evil acts, from putting foreign policy into the realm of politics⁸ to subordinating the interests of the

⁷ E.g., *Daily News*, New York, October 29, 1944, editorial: "The Roosevelt policy is to love the world first and ourselves second."

⁸ The columnist Thomas L. Stokes, writing in the *Philadelphia Record*, September 12, 1946, said the following: "One point frequently raised, and by some who know better, is worth noting because of its naivete. This is the criticism that the Secretary of Commerce took foreign affairs into politics, as if that were a crime. He did it, and intentionally."

"Foreign affairs is hip-deep in politics in this country. It always has been; it always will be."

United States.⁹ It is possible, one may assume, to disagree with Mr. Wallace's views in logical terms and on reasonable grounds. In addition, however, it has evidently become customary, in political debate on this and other issues, to utilize as a weapon charges of subservience to foreign powers and "ideologies".¹⁰ And part of the attack on Mr. Wallace has taken the form of aspersions on his loyalty and accusations that he favors Russia's interests over those of the United States.

However legitimate this technique of controversy may be in the free-for-all of the political arena,¹¹ it cannot be imported into official Government employment policies. It cannot justify official condemnation of certain sets of views as potentially disloyal. And yet this is precisely the type of thinking which the Civil Service Commission has applied to the plaintiff.

The opinion of the Court below in the present case fell into the same error. We have already discussed the extent to which it imposed its own political views as the norm of loyalty, and condemned the plaintiff by reason of his dissent from them (our main brief, pp. 36, 37).

The political freedom guaranteed to Federal employees means little if, by easy distortions into "doubts as to loyalty", their thoughts become subject to administrative or judicial censorship. And these distortions inevitably follow an attempt to restrict the political thinking of

⁹ "Wallace has taken the Russian side of the argument * * * has * * * dunked himself in Communist-Russian thought * * * has associated so long with Communists that he can no longer express the American point of view." *Philadelphia Record*, September 17, 1946.

"He has weakened America; he has strengthened Russia * * * he has lowered our prestige in all the world." *Daily Mirror*, New York, September 20, 1946.

¹⁰ See quotations in our main brief, p. 27, n. 11. The political campaign just concluded supplies abundant additional illustrations.

¹¹ *The New York Times*, while disagreeing with Mr. Wallace, editorially expressed the hope that there be no accusations that he "wants to sell out the country to Russia". September 21, 1946.

Federal employees into a more confined compass than is permitted by law. This point was most clearly made in the opinion of Madden, J., in the Court of Claims in *Lovett, Watson and Dodd v. United States*, 104 Ct. Cl. 557 at 589-590 (1945):¹²

"Nothing is claimed to have been done or said or written by any of the plaintiffs which was unlawful. No statute or legal doctrine is brought forward under which it claimed that they could have been restrained before utterance or action, or punished thereafter by so much as a penny fine. And no indirect legal consequences were attached to what they said or did by any legal doctrine, or by statutes such as the Hatch Act, or the various provisions in other acts disqualifying for Government employment members of organizations which advocate the overthrow of our constitutional form of government. It is not claimed that they violated those laws. In short, what they did was completely innocent and of no interest or consequence to the law of the land as it then was, or, as to all persons except the three plaintiffs, as the law still is. And this was true without any resort to constitutional protections of freedom of utterance or action. The law, wholly apart from the Constitution, did not touch what they had done. But as a consequence of their having done what they did, the three plaintiffs find themselves excommunicated, reduced to the status of three second-class citizens among all of the millions of their fellows. They find themselves subject to the same obligations as their fellow first-class citizens to obey the laws, pay taxes, and serve in the armed forces and on juries; but completely and perpetually disqualified from serving their Government in any of the thousands of positions in which any of the rest of us, if technically capable, may serve. * * *

¹² It should be noted that the Supreme Court's affirmance in this case was on the grounds relied upon in the concurring opinion of Judge Madden, rather than the grounds of the majority opinion of the Court of Claims. See *United States v. Lovett*, ... U. S., 66 Sup. Ct. 1073 (1946).

"If Section 304 is valid, Congress can disqualify for public office or service racial minorities, political minorities, and, probably, religious minorities. * * *" ¹³

Plaintiff's sworn allegation that he violated no law which would bar him from office (App. 13) stands uncontradicted.

D. The Government climaxes the portion of its brief devoted to political argument with a chain of increasingly invidious "presumptions" and "inferences" which, while apparently conceding that plaintiff is not a member of the Communist Party, suggest that he was sympathetic to its program which, it asserts, included the advocacy of the overthrow of the Government (pp. 38-43). The formidable array of lower court opinions on this latter point must be taken with some caution in the light of *Schneiderman v. United States*, 320 U. S. 118, 83 S. Ct. 1333 (1943). But in any case, as is pointed out in our main brief (pp. 7, 40), there is plaintiff's sworn and undisputed evidence that he does not advocate the overthrow of the Government, and the confirmatory testimony of the responsible officials who worked with him in the Government. It requires more than slender inferences of guilt by imputation to overcome the clear slate of the record in this case.¹⁴

¹³ A report of the Attorney General submitted in 1942 recognized the futility and danger of investigations of Federal employees based upon their association with lawful organizations. Indeed, the following recommendation was made by the Interdepartmental Committee on Investigations:

"1. That hereafter investigations of Federal employees be restricted to those instances in which there is substantial reason for suspecting that *there has been a violation of law* requiring prosecution or dismissal from the Federal service * * *." H. Doc. 833, 77th Cong., 2nd Sess. (1942), p. 28.

¹⁴ Examples of rebuffs administered by Senators to attempts, during hearings on the nomination of Mr. Justice Frankfurter to the Supreme Court, to impute to him the opinions of other individuals through an organizational affiliation appear in *Hearings before a Subcommittee of the Senate Judiciary Committee on the Nomination of Felix Frankfurter*, 76th Cong., 1st Sess., Jan. 11-12, 1939, especially at pages 10, 35.

POINT IV

The remedies sought by the plaintiff are proper.

The Government argues (pp. 44-46) that, even assuming that plaintiff's substantive rights have been violated in a manner requiring judicial correction, the particular remedies requested by the plaintiff are nevertheless inappropriate. It is frankly arguing for the establishment of a right without a remedy.

Aside from the obvious fallacy of this contention, the remedies requested by the plaintiff are precisely those which have been recognized judicially as proper for this type of case. Thus, in *Borak v. Biddle*, *supra*, this Court granted a declaratory judgment upholding an employee's suit against a dismissal in violation of applicable Government regulations. Moreover, the Court stated that a writ in the nature of mandamus would issue, subject only to a stay of execution pending appeal. And this Court affirmed the issuance of mandamus in an earlier case involving an illegally dismissed Government employee. *Whitwell v. U. S. ex rel. Selden*, 61 App. D. C. 169, 58 F. 2d 895 (1932).

As to injunction, the request for this relief against the Civil Service Commission is directed merely at prohibiting the Commission from interfering with compliance with an order of the Court directed to the defendant Secretary of Labor, in the event that plaintiff's dismissal is held illegal.

White v. Berry, 171 U. S. 366, 19 S. Ct. 917 (1898), held that injunction was not available to prevent a dismissal of an employee not as yet effectuated. It certainly does not hold that injunction is not available to prevent one Government agency from interfering with the compliance by another agency with an order of the Court. Moreover, *White v. Berry*, while denying an injunction in advance of actual dismissal, carefully pointed out that there were ap-

propriate remedies available at the proper time, including the common law remedies of mandamus and other prerogative writs, the principles of which are still applied under the Federal rules. 171 U. S. at 377, 18 S. Ct. at 921.

CONCLUSION

The judgment of the Court below should be reversed.

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